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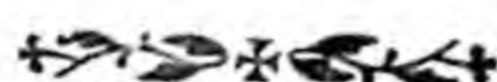


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BOMBAY HIGH COURT

1949

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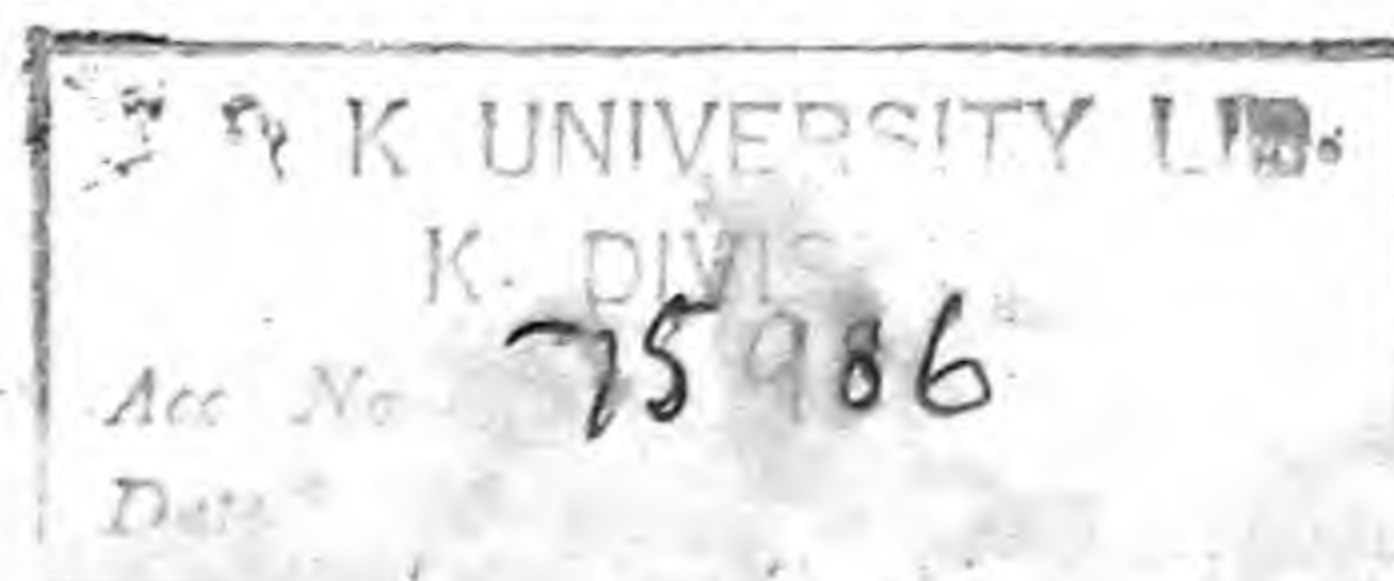
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A. I. R. Bombay = Other Journals

A I R 1947 Bombay			AIR 1948 Bombay			AIR 1948 Bombay			AIR 1948 Bombay		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
217	ILR (1948) B	1	87	ILR (1948) B	588	254	ILR (1948) B	672	337	ILR (1948) B	521
272	ILR (1948) B	223	101FB	ILR (1948) B	309	272	ILR (1948) B	693	347	ILR (1948) B	316
276FB	ILR (1948) B	416	163	ILR (1948) B	66	301	ILR (1948) B	439	357	ILR (1948) B	86
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77	ILR (1948) B	432	250	ILR (1948) B	199	334FB	ILR (1948) B	213	409	ILR (1948) B	559
			232	ILR (1948) B	145	336	ILR (1948) B	342	413	ILR (1948) B	566

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AIR 1949 Bombay			AIR 1949 Bombay			AIR 1949 Bombay			A. I. R. 1949 Bombay		
AIR	Other Journals		AIR	Other Journals		AIR	Other Journals		AIR	Other Journals	
1	50 B L R	426	73	50 B L R	588	161	50 Cr L J	591	277	51 B L R	342
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17	50 B L R	368		ILR (1948) B	651		50 Cr L J	635	311	51 B L R	466
	1948-16 ITR	294	76	50 B L R	612	170	51 B L R	165	314FB	51 B L R	556
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	ILR (1948) B	384	80	50 B L R	618	178	51 B L R	113	343	51 B L R	498
31	50 B L R	477	82	50 B L R	593		1949 17 ITR	213	346	51 B L R	528
33	50 B L R	449		50 Cr L J	196	182	51 B L R	122	348	51 B L R	525
	ILR (1948) B	417	84	50 B L R	446	188	51 B L R	148	350	51 B L R	477
34	50 B L R	362		50 Cr L J	199		ILR (1948) B	863	351	51 B L R	471
	1948-16 ITR	260		ILR (1948) B	426	193	51 B L R	156	356	51 Bom L R	491
36	ILR (1948) B	380	86	50 B L R	579	197	51 B L R	86	359	51 Bom L R	615
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37	50 B L R	290		50 Cr L J	320	213	51 B L R	242	367	51 Bom L R	623
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39	50 B L R	326	100	50 B L R	622		51 B L R	103	377	51 Bom L R	675
	1948-16 ITR	165	104	50 B L R	747	229	51 B L R	190		1949 17 ITR	520
41FB	50 B L R	574	108	50 B L R	708	242	51 B L R	140	379	51 Bom L R	608
	50 Cr L J	137	109	50 B L R	728		ILR (1948) B	845	384	51 Bom L R	585
42	50 B L R	450	115	50 B L R	696	248	51 B L R	238		51 Cr L J	39
56	50 B L R	413	119	50 B L R	701	250	51 B L R	276	387	51 Bom L R	568
				ILR (1948) B	786	252	51 B L R	162		51 Cr L J	47
63FB	50 B L R	598	125	50 B L R	711	254	51 B L R	272	390	51 Bom L R	744
	ILR (1948) B	625	129FB	51 B L R	28	257	51 B L R	219	391	51 Bom L R	770
64	50 B L R	604	131	50 B L R	718	260	51 B L R	252	400	51 Bom L R	684
	ILR (1948) B	610	134	50 B L R	744	262	51 B L R	271	402	51 Bom L R	788
69	50 B L R	372	137FB	51 B L R	34	263	51 B L R	226	405	51 Bom L R	564
	1948-16 ITR	319	141	51 B L R	58	266	51 B L R	245		51 Cr L J	84
71	50 B L R	576	154	51 B L R	47	271	51 B L R	230	408	51 Bom L R	734
	50 Cr L J	147	158	51 B L R	79	274	51 B L R	234	415	51 Bom L R	716
	ILR (1948) B	631	161	51 B L R	108	276	51 B L R	241		1949-17 ITR	482

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ILR	A I R			ILR	A I R			BLR	A I R			BLR	A I R			BLR	A I R		
1	1947	B	217	588	1948	B	87	156	1948	B	193	515	1949	B	337	797	1950	B	89
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- (11) 36 Bom. 53 = 13 Bom L R 973 = 12 I C 547, Kassum Goolam Hussein v. Dayabhai Amarsi Overruled in AIR(36) 1949 Bom. (C N 16) 63 (F.B.).
- (22) A. I. R. (9) 1922 Bom. 170 = 46 Bom. 463 = 23 Bom. L. R. 1238 = 64 I. C. 570, Narsinha Gopal v. Balwant Madhav Overruled in A. I. R. (36) 1949 Bom. (C. N. 31) 97 (F.B.).
- (26) 28 B. L. R. 1357 = 98 I. C. 911, Shravan v. Fattu Overruled in A. I. R. (36) 1949 Bom. (C. N. 42) 137 (F.B.).
- (26) A. I. R. (13) 1926 Bom. 81 = 27 Bom. L. R. 1453 = 91 I. C. 990, Narayan Bapuji v. Rajimal Motiram Overruled in A. I. R. (36) 1949 Bom. (C. N. 31) 97 (F.B.).
- (37) A. I. R. (24) 1937 Bom 279 = 39 Bom. L. R. 382 = I. L. R. (1937) Bom. 508 = 170 I. C. 393 (F.B.), Babu Sakharan v. Laboo Sambhaji. Overruled by A.I.R. (30) 1943 P. C. 196 in A.I.R. (36) 1949 Bom. (C. N. 64) 242.
- (38) A. I. R. (25) 1938 Bom. 383 = 40 Bom. L. R. 559 = I. L. R. (1938) Bom. 679 = 177 I. C. 165 (F.B.), Krishnaji Ragbunath v. Rajaram Trimbak. Impliedly Overruled by A.I.R. (30) 1943 P. C. 196 in A. I. R. (36) 1949 Bom. (C. N. 64) 242.
- (39) A. I. R. (26) 1939 Bom. 414 = I. L. R. (1939) Bom. 576 = 41 Bom. L. R. 924 = 185 I. C. 874, Tarabai v. Murtacharya Overruled in A.I.R. (36) 1949 Bom. (C. N. 82) 314 (F.B.).
- (42) A. I. R. (29) 1942 Bom. 280 = 44 Bom. L. R. 661 = 202 I. C. 648, Madhavsang Haribhai v. Dipchand Jijibhai Impliedly Overruled by A.I.R. (30) 1943 P. C. 196 in A. I. R. (36) 1949 Bom. (C. N. 64) 242.
- (48) F. A. No. 365 of 1947, decided on 1st April 1948, Surjitlal Ladhamal v. Chandrasingh Manibhai Overruled in A.I.R. (36) 1949 Bom. (C. N. 59) 210 (F.B.).
- (48) A. I. R. (35) 1948 Bom 20 = 49 Bom. L. R. 468, Shripad Amrit v. H. V. Divatia. Reversed in A. I. R. (36) 1949 Bom. 19.

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Bombay High Court

* A. I. R. (36) 1949 Bombay 1 [C. N. 1.]

CHAGLA C. J. AND TENDOLKAR J.

Ramesh Ramanlal Saraiya — Appellant
v. Kusum Madgaokar — Respondent.

O. C. J. Appeal No. 13 of 1948, Decided on 6th April 1948, from order of Coyajee J., D/- 26th January 1948.

"Divorce Act (1869), S. 37—Wife granted decree for nullity of marriage — She can be given decree for permanent alimony and necessary inquiry for fixing amount can be made—S. 7, Scope of—Applicability of English Law — Divorce Act (1869), S. 7.

Where upon a petition against her husband for a declaration that the marriage between them was null and void on the ground of the impotency of her husband, the wife is granted a decree for nullity of marriage the Court has jurisdiction to grant her permanent alimony and make necessary inquiry for the purpose of fixing the amount. [Paras 1, 17 and 35]

If Ss. 36 and 37 had stood alone, the Court would not have such a power in case of a decree for nullity of marriage. But under S. 7 the Courts in India are empowered to act and give relief on the principles and rules which prevail in England from time to time. Section 7 deals with matters of substantive law and not adjective law and hence according to the principles and rules prevailing in England, even substantive law can be altered and modified under this section. The object of enacting this section was to make the Indian divorce law flexible and not static. The intention was that the law here should develop alongside with the English law. The Court must consider every time it proceeds to act or give relief what is the relevant English law on the subject and unless it finds that the jurisdiction of the Court to grant the same relief or act in the same manner is expressly negated by any provision of the Act, it must do so. There must be either a clear negating of the jurisdiction of the Court or there must be express and unequivocal terms in which the Legislature must have prevented and prohibited the Courts here from acting in the manner in which the English Courts would act or giving the same relief that the English Courts would give on the same facts and on the same materials. Section 37 does not contain any express prohibition against the Court granting permanent alimony in nullity cases: AIR (23) 1936 Mad. 324 (FB), *Rel. on*; 4 Beng. L. R. (O. C.) 51; 22 Bom. 612; 23 Bom. 460; A.I.R. (10) 1923 Bom. 321 (FB); (1921)

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P. 204; A.I.R. (18) 1931 P. C. 234; (1892) P. 1; A. I. R. (22) 1935 Oudh 133 and 19 Bom. 293, *Considered*; A. I. R. (8) 1921 Cal 517; 30 Cal. 489; and A. I. R. (8) 1921 Cal 820 (FB), *Dissent*. [Paras 3 and 5]

V. F. Taraporewala, M. P. Amin and Y. G. Rege
— for Appellant.

M. L. Manekshaw and S. D. Vimadlal — for Respondent.

Chagla C. J. — This is an appeal from an order of Coyajee J. The respondent, who is the wife, filed a petition against her husband for a declaration that the marriage between them was null and void on the ground of the impotency of her husband. The husband filed a counter petition also praying for a decree of nullity on the ground that the wife suffered from impotency. Coyajee J. decreed the wife's petition and gave her a decree for nullity of marriage. The petition of the husband was dismissed. Having granted the decree Coyajee J. proceeded to pass the order which is the subject of this appeal, viz., to order an inquiry for the purpose of fixing the amount of permanent alimony which should be given to the wife. It was contended before Coyajee J. that the Court had no jurisdiction to grant permanent alimony to the wife in a case where a decree for nullity was passed. Coyajee J. rejected that contention and held that the Court had jurisdiction and the necessary inquiry should be made for the purposes of fixing the amount. Before us also Mr. Taraporewala has contended that the Court has no jurisdiction to grant permanent alimony to the wife in a suit where a decree is passed for nullity of marriage.

[2] In order to understand and fully appreciate the submission made by Mr. Taraporewala it is necessary to consider the scheme of the Indian Divorce Act. The Act was passed in 1869 at a time when the jurisdiction of the Ecclesiastical Courts in England which used to

deal with matrimonial cases had come to an end and that jurisdiction had been vested in the Court for Divorce and Matrimonial Causes by the passing of the Matrimonial Causes Act in 1857. Part II of the Indian Divorce Act deals with the jurisdiction of the Courts. Part III deals with dissolution of marriage on the grounds stated in S. 10. Part IV deals with nullity of marriage and enables the Court to pass a decree on the grounds stated in S. 19. Part V deals with judicial separation and a decree for judicial separation. Part VII deals with restitution of conjugal rights and Part IX deals with alimony. Section 36 deals with alimony *pendente lite* and it is clear that under that section in terms the Court has been given the power to award alimony *pendente lite* in suits for dissolution of marriage and also for nullity of marriage. Then we come to S. 37 which deals with permanent alimony and that section gives the power to the High Court and to the District Judge after confirmation of the decree to grant permanent alimony only in those cases where a decree is passed declaring the marriage to be dissolved or a decree for judicial separation. Section 37 does not enable or entitle the Court to grant permanent alimony where it passes a decree for nullity of marriage, and Mr. Taraporewala's contention is that looking at ss. 36 and 37 it is perfectly clear and patent that the Legislature did not intend to confer upon the Courts here the jurisdiction to award permanent alimony in cases of nullity of marriage. Mr. Taraporewala points out that S. 36 which deals with alimony *pendente lite* in terms gives the power to the Court even in cases of nullity of marriage. Section 37 which deals with permanent alimony restricts that power only to cases of dissolution of marriage and of judicial separation and Mr. Taraporewala contends that the Legislature by expressly dealing with two classes of cases where permanent alimony can be granted has by implication and a necessary implication excluded the jurisdiction of the Courts to award permanent alimony in the third class of cases, viz. cases of nullity of marriage. If ss. 36 and 37 stood alone in the Act, I think Mr. Taraporewala's argument would be irresistible and unanswerable. The well-known maxim *expressio unius est exclusio alterius* would apply to a case like this. But we have a section in the Act to which I shall presently refer, S. 7, which, as some Judges have pointed out, contains unusual provisions and, as other Judges have pointed out, contains remarkable provisions. There can be no doubt that S. 7 seems hardly to have any parallel in any other Indian legislation. Section 7 is in these terms:—

"Subject to the provisions contained in this Act, the

High Courts, and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

[3] This is a section that appears in the Part which deals with jurisdiction and undoubtedly S. 7 confers jurisdiction upon the Court of the nature and character provided in that section. The Courts in India are empowered to act and give relief on the principles and rules which prevail in England, not only which prevailed at the time when the Divorce Act was passed in 1869 but which may prevail from time to time subsequently. The section does not deal with procedural matters because S. 45 of the Act which appears in the Part headed "Procedure" expressly deals with procedure and provides that all proceedings under the Act between party and party shall be regulated by the Code of Civil Procedure. It really deals with matters of substantive law and not adjective law, and, therefore, according to the principles and rules prevailing in England, even substantive law can be altered and modified under this section. Mr. Taraporewala has argued that it is only in giving relief that the principles and rules on which the English Court of Divorce and Matrimonial Causes acts that should be taken into consideration. Mr. Taraporewala says that as far as the relief itself is concerned, that relief must be expressly found in the statute, and when the Court here proceeds to grant that relief, then it must observe and conform to the rules and the principles of the English Court. That contention, in my opinion, is entirely untenable in view of the plain language of the section itself. The section does not speak that in giving relief the Court should act on principles and rules of the English Courts, but it directs the Courts here to act and to give relief on principles and rules prevailing in England. Of course, the section is prefaced by the opening words "subject to the provisions contained in this Act," and, therefore, it is not open to the Court here to give any relief or to act in any manner which is contrary to or inconsistent with any provision contained in the Act. The object of enacting this section was to make the Indian divorce law flexible and not static. The intention was that the law here should develop alongside with the English law. It may seem surprising that it should be left to the Legislature of another country to mould and modify the law of this country. It was surprising enough when India was a Dependency in the Empire. It seems to be even more surprising today that such a provision should find place in the Divorce Act of

this country when India has now become a full-fledged Dominion as sovereign as England herself. In my opinion S. 7 lays down this rule of law that the Court must consider every time it proceeds to act or give relief what is the relevant English law on the subject, and unless it finds that the jurisdiction of the Court to grant the same relief or act in the same manner is expressly negatived by any provision of the Act, it must do so. There must be either a clear negating of the jurisdiction of the Court or there must be express and unequivocal terms in which the Legislature must have prevented and prohibited the Courts here from acting in the manner in which the English Courts would act or giving the same relief that the English Courts would give on the same facts and on the same materials.

[4] In order to give proper effect to Ss. 36 and 37 read with S. 7—and we must read these sections with S. 7, because, as has been pointed out by learned Judges, S. 7 is the dominating section in the Act—we have to consider what the state of the English law was in 1869 when the Divorce Act was passed. The Ecclesiastical Courts had exercised the jurisdiction to grant decrees for judicial separation. In some exceptional cases they used to pass decrees of nullity of marriage, but they had no jurisdiction and they never exercised it of passing decrees for dissolution. They used to award permanent alimony in cases where they passed decrees for judicial separation, but they never granted permanent alimony even in those rare cases where they passed decrees for nullity. When, as I have stated earlier, in 1859 the Matrimonial Causes Act was passed, the whole jurisdiction of the Ecclesiastical Courts became vested in the Supreme Court of Judicature in England. Therefore, as the heir of the Ecclesiastical Courts, the English Court had the jurisdiction to grant permanent alimony in cases of judicial separation. With regard to granting permanent alimony in cases of dissolution of marriage, that power was expressly given to the English Courts by the Act of 1857. But as far as nullity suits were concerned, the English Courts never had that power till 1907 when for the first time that jurisdiction was conferred upon the English Courts and the English Courts began granting permanent alimony in cases of nullity. As regards alimony *pendente lite* the English Courts had the jurisdiction to grant such alimony not only in suits for dissolution and judicial separation but also in suits for nullity. Therefore, we find that Ss. 36 and 37 exactly reproduce the English law as it stood in 1869. There was no question of the Legislature providing for permanent alimony in nullity suits, because the English

Court did not possess such jurisdiction or such power.

[5] The question that, therefore, arises for determination and decision is whether, when in 1907 the English Court was given the jurisdiction of granting permanent alimony in nullity suits, by reason of S. 7 this Court also obtained the jurisdiction to grant permanent alimony in those cases. It is clear that S. 37 does not contain any express prohibition against the Court granting permanent alimony in nullity cases. All that we find in S. 37 is an omission to do so, and as I have pointed out that omission is explicable on historical grounds because of the state of the law in England in 1869. If my reading of S. 7 is correct and the object of the Legislature was to provide elasticity and the development of Indian law along with the English law, then I see no reason why when the English rules and principles were modified and English Courts assumed to themselves the jurisdiction of granting permanent alimony in nullity cases the Courts here also should not possess the same jurisdiction and the same power.

[6] In the light of these observations which I have just made, I will consider the various cases which were cited at the Bar. There is a very old case as old as 1870 in *Abbott v. Abbott*, 4 Beng. L. R. (O.C.) 51 where Macpherson J. had to consider the effect of S. 7. The question there was with regard to pleadings in a suit by the husband for divorce on the ground of his wife's adultery and Macpherson J. held that S. 7 did not apply to points of procedure but to the general principles and rules on which the Court was to act and give relief.

[7] Then in *Ramsay v. Boyle*, 30 Cal. 489 this case was followed by Maclean C. J. The question that arose was whether in a wife's suit for divorce against her husband on the ground of incestuous adultery the adulteress had the right to intervene, and reliance was placed on the English law which permitted the adulteress to intervene, and the learned Chief Justice came to the conclusion that S. 7 did not apply to questions of procedure and, therefore, the English procedure could not be imported into cases here by reason of that section. There the only section that applied was S. 45.

[8] In *A. v. B.*, 22 Bom. 612 an appeal was preferred from a decree absolute although the decree *nisi* had not been challenged, and it was contended that in England if you did not appeal from the decree *nisi* your right of appeal disappeared, and Sir Charles Farran and Tyabji J. refused to apply the principles and rules regulating the English procedure and expressed the opinion that the principles and rules in S. 7 were

quasi-substantive rather than of mere adjective law.

[9] In *A. (Wife) v. B. (Husband)*, 23 Bom. 460 the question that arose for decision before Parsons Ag. C. J. and Ranade and Fulton JJ. was whether under the Indian Divorce Act a decree for nullity of marriage made by a District Court had to be confirmed by the High Court before the expiration of six months from the pronouncing thereof. The section dealing with nullity decrees did not expressly provide for confirmation. That was S. 19. The section that did provide for confirmation was S. 17 which applied to decrees for dissolution of marriage, but the Court held that by reason of S. 20 the relevant provisions of S. 17 were also imported into S. 19 and confirmation was necessary in a decree for nullity as much as a decree for dissolution. But Ranade J. at p. 464 having come to that conclusion considered S. 7 and points out that apart from construction analogy with the corresponding provisions of English law under S. 7 also led him to the same conclusion.

[10] Then we have a Full Bench decision of this Court reported in *Wilkinson v. Wilkinson*, 47 Bom. 843 : (A. I. R. (10) 1923 Bom. 321 (F.B.)). Till this case was decided this Court took the view on a plain grammatical construction of S. 2 of the Act that residence gave jurisdiction to the Court in divorce cases. In 1921 the case of *Keyes v. Keyes and Gray*, (1921) P. 204 : (90 L.J.P. 242) was decided and that Court took the view that the decrees passed by Indian Courts against persons who were not domiciled in India were not valid, and Sir Norman Macleod and Marten and Crump JJ. constituted a Full Bench to consider the effect of the decision in *Keyes v. Keyes*, (1921) P. 204 : (90 L.J.P. 242) and also to consider whether the previous view of this Court that residence conferred jurisdiction was the right view or not. With regard to jurisdiction the position in England was that the Ecclesiastical Courts entertained suits for judicial separation on the ground of residence and did not insist upon domicile. When the Matrimonial Causes Act of 1857 was passed with regard to dissolution of marriage domicile was made necessary in order to confer jurisdiction upon the English Court, and Sir Norman Macleod and Marten J. really in effect came to this conclusion that whether the wider jurisdiction was or was not conferred upon this Court by S. 2 of the Indian Divorce Act, in view of the fact that the English Courts acted on the principle of domicile and not of residence in dissolution cases and considering the provisions of S. 7, the Courts here had no jurisdiction in dissolution cases unless the parties were domiciled, but had jurisdiction in

cases of judicial separation merely on the ground of residence. Crump J. took a different view and dissented from the judgment of the majority. The observations made by the learned Judges in this case on the true construction of S. 7 and the effect of that section are both pertinent and significant. Sir Norman Macleod C. J., took the view that S. 7, Indian Divorce Act directly excluded the idea that the Act gave jurisdiction to decree divorce in the case of non-domiciled parties. Marten J., as he then was, referred to S. 7 as the dominating clause in the Act. He complimented the Indian Legislature on this skilful piece of legislation and he says (p. 870) :

"On the contrary the construction of the Act which I would adopt shews that the Indian Legislature dealt with a very difficult question in a most skilful manner, for by its flexibility it enabled all Courts in India and in England to act on the same principles, despite the passage of time and the change of circumstances."

At p. 867 the learned Judge says that the expression "subject to the provisions contained in this Act" in S. 7 must of course receive its full effect, and he considers the conditions precedent in S. 2 and the provision in S. 10, which entitles a wife to a divorce should her husband exchange his profession of Christianity for some other religion and go through the form of marriage with another woman, and points out that these examples show that the English divorce law is expressly varied. And Crump J., looked upon S. 7 as the residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act. *Wilkinson v. Wilkinson*, 47 Bom. 843 : (A. I. R. (10) 1923 Bom. 321 (F.B.)) provides a very extreme case where our Courts had been taking a particular view as to the jurisdiction the Courts had to deal with matrimonial cases, and because the English Court took a different view in 1921, notwithstanding a long series of cases in the past, this Court in *Wilkinson v. Wilkinson*, 47 Bom. 843 : (A. I. R. (10) 1923 Bom. 321 (F.B.)) changed its view and brought the law into conformity with the law prevailing in England.

[11] We have a decision of the Privy Council which is very much in point and that is *Iswarayya v. Iswarayya*, 58 I. A. 350 : (A. I. R. (18) 1931 P. C. 234.) The question that the Privy Council had to consider was whether the Indian Courts had the jurisdiction to increase maintenance which had been granted to a wife on a decree for judicial separation. It was contended before their Lordships that on a proper construction of S. 37 once an order for maintenance was made the Court had no jurisdiction to increase the maintenance. Their Lordships in the first place came to the conclusion that the section did not lend itself to that interpretation and the section itself gave the power to the Courts not

merely to fix maintenance once only but the Courts could vary it from time to time as the circumstances changed. Having decided this, the judgment of the Privy Council, which was delivered by Lord Russell of Killowen, went on to deal with the position under S. 7 as confirmatory of the opinion which the Privy Council had formed on the construction of the section itself, and in considering S. 7 they considered what the English law was at the time. Under the English law the Ecclesiastical Courts had the power to grant maintenance to the wife on a decree for judicial separation and also to vary it from time to time. With regard to dissolution of marriage as the Ecclesiastical Court never had the power to dissolve marriages, naturally there was no power in them to grant maintenance or alimony. The power to grant maintenance or alimony was conferred upon the English Court in 1857, but it was only in 1907 that the power to increase maintenance following upon a decree for dissolution was granted to the Court. Therefore, in 1869 when the Indian Divorce Act was passed, the Legislature had before it the fact that the English Court could increase maintenance which it had awarded on the passing of a decree for judicial separation. Notwithstanding this the Indian Legislature failed to make any express provision in S. 37 for increase of maintenance at least in cases of judicial separation and one should have thought that no argument would have been stronger than this that the Legislature knowing the English practice had deliberately departed from it in the Indian law when it enacted the Divorce Act of 1869. Even so their Lordships of the Privy Council refused to accept that contention and took the view that if it was the intention of the Legislature to prohibit and prevent the Indian Courts from increasing maintenance in cases of judicial separation, that intention should have been declared in express and unequivocal terms. In that case, as I have just said, the Indian Legislature failed to make provision with regard to increased maintenance following upon a decree of judicial separation although the English Courts had the jurisdiction to do so. In the case before us the Indian Legislature in S. 37 has failed to make any provision with regard to permanent alimony following a decree of nullity, because at the time when the Act was passed the English Courts had no such jurisdiction.

[12] Mr. Taraporewala has very strongly relied on a decision of the Calcutta High Court in *Turner v. Turner*, 48 Cal. 636 : (A. I. R. (8) 1921 Cal. 517). In that case a successful petitioner in a suit for dissolution of marriage married within six months from the decree for

dissolution of marriage becoming absolute, and the Court held that the second marriage was null and void. Then the question arose whether the reputed wife was entitled to permanent alimony and the Court consisting of Sanderson C. J., Woodroffe and Richardson J. came to the conclusion that under S. 37 the power of the Court was limited to making an order for permanent alimony to cases in which a decree had been made declaring a marriage to be dissolved or where a decree for judicial separation had been obtained by the wife. Undoubtedly, if this case represents good law, then Mr. Taraporewala is right in his contention. But one or two facts, and important facts, must be borne in mind with regard to this decision. In the first place this decision was given ten years before the Privy Council case to which I have just referred and, although S. 7 was referred to at the bar, with very great respect to the learned Chief Justice and his two colleagues, there is no reference whatsoever to this section in the judgment either of the Chief Justice or of Woodroffe J. In the judgment of the Chief Justice the correct view is taken that S. 37 omitted to give power to the Court, where the decree declared the marriage null and void, to grant permanent alimony. With great respect again, the learned Chief Justice failed to draw the necessary conclusion that, if S. 37 merely omitted to give power to the Court, it was open to the Court to assume that power under S. 7 of the Act. In my opinion, therefore, *Turner v. Turner*, 48 Cal. 636 : (A. I. R. (8) 1921 Cal. 517) does not lay down the correct law.

[13] But there is a decision of the Madras High Court which was delivered after the Privy Council case and which takes the same view of S. 7 which I have been suggesting. That is the case reported in *Sumathi Ammal v. Paul*, 59 Mad. 518 : (A. I. R. (23) 1936 Mad. 324 (F. B.)) Under the Divorce Act S. 16 provides for a decree *nisi* being passed in a suit for dissolution. There is no such provision with regard to the passing of a decree in a suit for nullity and the Full Bench of the Madras High Court held that notwithstanding the fact that the Legislature had made no provision for the passing of a decree *nisi* in a suit for nullity of marriage the English rule should be followed and a decree *nisi* should be passed. It is pointed out in the judgment that at the time the Indian Divorce Act was passed the practice in England was to pass a decree *nisi* in the case of a suit for dissolution of marriage and a plain decree in the case of a suit for nullity of marriage. It was only in 1873 that the practice with regard to decrees in dissolution suits was extended to nullity suits, and at p. 528 Stone J. observes that

when there is a statutory change in England, the Matrimonial Courts in this country must also follow the change unless there is a provision in the Indian Divorce Act to the contrary, and Mockett J. at p. 531 takes the view that the intention of S. 7 was to prevent the principles and rules on which the Indian Courts were to give relief from being rigidly fixed. He also points out that the meaning of the expression "subject to the provisions contained in the Act" is that the Court cannot give any relief which is contrary to the provisions of the Act, and as an illustration he indicates that although in England now a wife can get dissolution of marriage on proof of adultery alone, she cannot do so under the Indian Divorce Act, because S. 10 requires that adultery must be coupled with cruelty or with desertion. He also opines that the whole object of S. 7 was to keep the practice of the Indian Divorce Court as nearly as possible in line with that of the English Court; otherwise this exceptional but most useful provision would lose much of its force; and he finally comes to the conclusion that as there was no provision in the Act that a decree for nullity should be *nisi* or absolute, the Act was silent, and it was open to the Court to import the rule prevailing in England.

[14] I stated earlier in my judgment that there was no parallel legislation which I was aware of in India corresponding to S. 7, Divorce Act, but I should have added that there is a somewhat analogous legislation in England on which really S. 7 itself is based. When the English Court took over the jurisdiction of the Ecclesiastical Courts and the Matrimonial Causes Act was passed in 1857, S. 22 was enacted. That section is identical in terms with S. 7 with this vital and important distinction that whereas S. 22 directs the English Court to proceed and act and give relief on principles and rules which were in operation before the passing of the Act of 1857, the Indian legislation goes further and makes the Indian law dependent upon the developing and changing English law. Section 22 merely speaks of the past; it does not in any way refer to conditions in the future. Our S. 7 in terms refers to English rules and principles for the time being. But the construction of S. 22 by the English Courts must be of considerable assistance to us, also, and we have a decision of the English Court in *Goodden v. Goodden*, (1892) (L.R.) P. 1 on the construction of this section. The question that arose before Lord Justices Lindley, Bowen and Kay was whether in a suit by a husband for judicial separation the wife was entitled to permanent alimony. It was contended that under S. 17, Matrimonial Causes Act, although applications for restitution of conjugal

rights or for judicial separation could be made either by the husband or the wife, it was only, as the section itself expressly stated, when the application was by the wife that the Court could make any order for alimony. Notwithstanding the clear language of the section, the Probate Court came to the conclusion that inasmuch as the Ecclesiastical Court had the power to grant alimony to a wife even when a decree was passed in favour of the husband for judicial separation, that power had not been taken away from the English Court by reason of S. 22, Matrimonial Causes Act, 1857. Kay L. J. says (page 5) :

"It would be giving extraordinary and unnatural force to the language of S. 17 to say that it takes away or even negatives the jurisdiction of the Court to grant alimony where the decree for separation is made at the suit of the husband, and, in our opinion, that is not the true effect of the provision."

[15] A very similar case arose in one of our own Courts. Our S. 37 also in terms provides that permanent alimony can be awarded in a case of judicial separation when the decree is obtained by the wife, and the question arose before the Oudh Court in *Mrs. Niblett v. Mr. Niblett*, A.I.R. (22) 1935 Oudh 133 : (10 Luck. 627) whether a wife was entitled to alimony when the husband obtained the decree for judicial separation, the same question which was considered by the English Probate Court, and the Court held that S. 37 did not limit the granting of alimony to a wife to cases of dissolution of marriage and decrees of judicial separation obtained by the wife. The Court had authority to grant permanent alimony to the wife even where the husband was granted a decree for judicial separation. In coming to that conclusion the Court invoked the assistance of S. 7 and considered the principles and rules followed by the English Divorce Courts.

[16] Mr. Taraporewala has relied on the Indian and Colonial Divorce Jurisdiction Act, 1926, as affording some assistance for the construction of S. 7. That Act gives power to the Courts in India to dissolve marriages and pass decrees for nullity of marriage in the case of British subjects domiciled in England or in Scotland. Section 1 (a) of the Act provided that the grounds on which a decree for dissolution of such a marriage may be granted by any such Court shall be those on which such a decree might be granted by the High Court in England according to the law for the time being in force in England, and sub-s. (b) reproduces in terms S. 7 of the Act.

[17] Now, says Mr. Taraporewala, that, if S. 7 and sub-s. (b) of S. 1 cover cases of granting reliefs which are not provided for under the Indian Act but which is done in pursuance of the rules followed by the English Courts, then sub-s. (a) was unnecessary and superfluous. Mr.

Taraporewala says that the very fact that the Legislature in this Act has expressly provided that the Indian Courts should grant a decree for dissolution on the same grounds as granted by the High Court in the England shows that S. 7 has a very limited application. Surely Mr. Taraporewala is guilty of a fallacy because S. 1 (a) refers to grounds, sub-s. (b) refers to reliefs, and there is a fundamental distinction between the two. A decree for dissolution is the relief which a Court grants on certain grounds. The grounds are mentioned in S. 10, Divorce Act. It may be—I am not deciding this question—that under S. 7 it would not be open to the Court to add to or change those grounds. But it is entirely a different thing to say that once a decree for dissolution is passed or a decree for nullity is passed the Court is not entitled to grant the same relief which the Court in England can grant or would grant; and the subsequent legislation makes this position clear. A declaratory Act was passed in 1940. That was done for removal of doubts, and it was provided that in considering what were the grounds on which a decree for the dissolution of any marriage may be granted by the High Court in England and what were the principles and rules on which, in the exercise of its jurisdiction to make decrees for the dissolution of a marriage, and, as incidental thereto, to make orders as to damages, alimony or maintenance, custody of children and costs, the High Court in England for the time being acts and gives relief, certain amendments effected by the Matrimonial Causes Act, 1937, were to be taken into account. This Act clearly shows the distinction between grounds on which a dissolution of marriage may be granted and the principles and rules on which reliefs may be granted which are incidental to decrees for dissolution of marriage. Therefore, relief in the nature of alimony is really a relief which is incidental to the passing of the decree in the suit which is a decree for dissolution or a decree for nullity. I, therefore, agree with the learned Judge below that this Court has jurisdiction to grant permanent alimony consequent upon the passing of a decree for nullity and this power and jurisdiction is derived not from S. 37 but from S. 7 of the Act. The omission of the Legislature to provide for this under S. 37 does not in any way militate against the power of this Court to follow the principle and rule followed in England and to give the necessary relief under S. 7 of the Act.

[18] The appeal, therefore, fails and must be dismissed with costs.

[19] **Tendolkar J.** — This appeal raises an important question of law under the Indian Divorce Act, being Act IV of 1869. The question

is whether under the said Act, after a decree for nullity of marriage has been passed, the Court has jurisdiction to grant permanent alimony. I have not used the phrase "permanent alimony" in the narrow sense in which it is sometimes used by the Matrimonial Courts in England. In England it is usual to differentiate between the allowance made after a decree for judicial separation or for divorce or nullity of marriage or for restitution of conjugal rights. The allowance made after a decree for judicial separation is termed "permanent alimony," that made after a decree for divorce or nullity of marriage is termed "maintenance" and that after a decree for restitution of conjugal rights is termed "periodical payments." All these allowances, so far as the Indian Divorce Act is concerned, are included in the comprehensive phrase "permanent alimony." The provisions of the Indian Divorce Act relating to alimony are to be found in Ss. 36 and 37 thereof. Section 36 deals with alimony *pendente lite* only; and it is not disputed that under that section the Court has jurisdiction to grant alimony *pendente lite* even in cases of nullity of marriage. Under S. 37, Indian Divorce Act, the Court is enabled in terms to grant permanent alimony only on a decree for dissolution of marriage or a decree for judicial separation. These two sections in effect enact the law as it stood in England when the Divorce Act was enacted in 1869. If these sections stood by themselves, there can be no doubt at all that the Court has no jurisdiction to grant permanent alimony after a decree for nullity of marriage. But it is argued that the Court has such jurisdiction by reason of a somewhat extraordinary provision which is to be found under S. 7, Indian Divorce Act. That section is in these terms:—

"Subject to the provisions contained in this Act, the High Courts, and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which in the opinion of the said Courts, are, as nearly as may be, conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief."

[20] Now, this provision is certainly an extremely unusual one. There is no parallel to it in any legislation that I am aware of. It is an attempt to incorporate into the laws of this country the principles and procedure followed by the Matrimonial Courts of another country, viz., England from time to time—to what extent of course is a matter in dispute before us with which I will deal later. I may point out that the operative words of this section, unusual as the section is, have been borrowed verbatim from S. 22, Matrimonial Causes Act, 1857. That section required the Court of Divorce and Matrimonial Causes, which superseded the Ecclesias-

tical Courts in England to act and give relief on principles and rules of the Ecclesiastical Courts; but there is this important difference between that section and the section in the Indian Divorce Act: S. 22 of the English Act, required the Courts to follow the principles and rules on which "the Ecclesiastical Courts have heretofore acted and given relief," while in India the Courts have to follow the principles and the rules which are followed by the Courts in England for the time being. There is also another important distinction, viz., that the English Act only contemplated incorporating into English law rules of their own Courts which were in existence before the Court of Divorce and Matrimonial Causes was established, while under the Indian Act, the provision incorporates into the law of this country the principles and rules followed in another country altogether.

[21] It is contended that under S. 7, Indian Divorce Act, this Court must ascertain whether under the principles and rules followed by the Matrimonial Courts in England permanent alimony can be granted after a decree for nullity of marriage. In England there was no such provision until 1907 when that provision was included by S. 1, Matrimonial Causes Act, 1907. That has been continued in force by S. 190(1), Judicature Consolidation Act, 1925. That being so, it is argued that by reason of S. 7, Divorce Act, the Courts in India, acting on the principles and rules which are followed by the Courts in England, have power to grant permanent alimony after a decree for nullity of marriage.

[22] I have, therefore, to consider what is the true meaning to be given to S. 7, Indian Divorce Act. It is well established by several authorities of the High Courts in India that this section does not deal with procedure only but deals with *quasi*-substantive or substantive rights. Indeed the Calcutta High Court has held that it does not deal with procedure at all. But in that respect I prefer the opinion of our own High Court expressed by Farran C. J. in *Mayhew v. Mayhew*, 19 Bom. 293 that in so far as procedure is not adequately provided for under the Civil Procedure Code which is made applicable by S. 45 of the Act, the Courts in India can follow the English practice and procedure under S. 7. But that point does not arise for determination in this suit. It is sufficient to say that this section does not deal with procedure only. It is equally clear that the principles and rules that are to be applied are not the principles and rules which applied in England at the date when the Indian Divorce Act was enacted, but they are the principles and rules that are applied by the English Courts from time to time. There is one important limitation to the application of such

principles and rules in India. That limitation is to be found in the opening words of the section, viz. "subject to the provisions contained in this Act." Those words to my mind mean that no principle or rule of English law can be applied which violates any of the provisions of the Indian Divorce Act. It does not mean that where the Indian Divorce Act is merely silent on any particular matter, the principles and rules governing such matter in England cannot be applied in India. But the real contest is as to the meaning of the operative words of this section. Those words are "act and give relief." It is contended by Mr. Taraporewala for the appellant that before S. 7 can come in at all the relief must be found in the Act itself. The Court can then proceed to give that relief according to the principles and rules followed in England. It is also contended by him that this section appears under the general heading "jurisdiction"; and the principles and rules of the English Courts which are contemplated by this section are principles and rules dealing with jurisdiction only. I am unable to agree with either of those contentions. To hold that the relief must first be found in the Act itself is to my mind doing violence to the language of the section. The words used in the section are not "in giving relief the Court shall act"; the words are "act and give relief," so that it is for the purpose of giving relief itself that the principles and rules of English law have got to be applied. Similarly, the fact that S. 7 appears under the general heading "jurisdiction," to my mind, does not limit the plain words of that section to principles and rules dealing with jurisdiction only. The words are general and they must apply to all cases of giving relief. I am, however, of opinion that before a Court can act or give relief under this section there must be a litigant who is entitled to invoke the jurisdiction of the Court to grant him relief, in other words, a litigant who has a proper cause of action under the Indian Divorce Act. It is only when a litigant who has a cause of action comes to a Court that the Court can act or give relief to him; and, therefore, I am not inclined to read these words as including the application of the principles and rules of English law to the creation of a cause of action, but only to the granting of reliefs where a litigant has a cause of action given to him under the Act.

[23] It is urged by Mr. Taraporewala that the interpretation which I am inclined to put on this section may bring about some startling results. It is for example pointed out by him that the grounds on which divorce can be obtained under the Indian Divorce Act are set out in S. 10. They are substantially different from the grounds of divorce allowed in England

under the Matrimonial Causes Act, 1937, s. 2, and indeed there are some additional grounds under the English law. Similarly, the grounds for nullity of marriage, which are to be found in s. 19, Indian Divorce Act, are different from the grounds for nullity of marriage under s. 7, Matrimonial Causes Act, 1937, which introduced several new grounds for nullity under the English law. Mr. Taraporewala contends that if the principles and rules of English law had to be introduced for the purpose of granting relief, then grounds either for nullity of marriage or for divorce not recognised under the Indian Divorce Act would be introduced into the Indian law. I must resist the temptation of expressing an opinion on this somewhat fascinating question because it does not arise for decision before us. *Prima facie*, with the qualification that I feel inclined to place on the interpretation of s. 7, viz., that it cannot be utilised for the purpose of inventing a cause of action for a litigant, I would be inclined to think that such grounds could not be introduced into India. But if they have to be as a result of what I consider to be the correct interpretation of s. 7, that is a consequence which to my mind has got to be faced; and that cannot deter us from putting the correct construction on s. 7, Indian Divorce Act. If, then, that is the correct interpretation to be placed on s. 7, it follows that this Court has jurisdiction to grant permanent alimony after a decree for nullity of marriage, because such relief is only incidental to the decree for nullity and does not in any manner change the cause of action of the party in whose favour the decree for nullity has been granted.

[24] I will next proceed to consider how far the decision I have arrived at is in consonance with the decided cases. I will first deal shortly with the cases of our own High Court which of course are binding upon us. The first of these cases is a case reported in *A. v. B.*, 22 Bom. 612. That case was decided by a Division Bench of this Court. The question for decision was whether an appeal lies from a decree absolute although the decree *nisi* had been left unchallenged. Farran C. J. in dealing with s. 7, Indian Divorce Act, observed as follows (p. 615):

"The principles and rules here referred to are not, we think, mere rules of procedure including rules which regulate appeals which are laid down in the subsequent sections (45 and 55) of the Act, but are the rules and principles which determine the cases in which the Court will grant relief to the petitioner appearing before it or refuse that relief—rules of *quasi*-substantive rather than mere adjective law. Exactly the same language was used in giving the Matrimonial Court in England jurisdiction to deal with cases over which the Ecclesiastical Courts had theretofore such jurisdiction: see 20 & 21 Vict., c. 85, s. 22. The above was the view taken in

Abbott v. Abbott, (4 Beng. L. R. (O. C.) 51) and is, we think, the correct view."

[25] We next have another Bombay case reported in *A (Wife) v. B (Husband)*, 23 Bom. 460. In this case the question for decision was whether a decree for nullity of marriage made by a District Court cannot be confirmed by the High Court before the expiration of six months from the pronouncing thereof. At the date when the Indian Divorce Act was passed, a decree for nullity was made absolute at once in England. But the English practice had subsequently been modified by providing for a decree *nisi*; and at the date when this case was actually decided, the position in England was that a decree *nisi* had to be passed and that a decree absolute could only be made six months thereafter. This substantive period of limitation was introduced by legislation in England. It was held that that period of limitation and the provision that a decree *nisi* must be made applied equally in India. The decision was arrived at on an interpretation of the sections of the Indian Divorce Act itself; but Ranade J. also came to the same conclusion by a consideration of s. 7, Indian Divorce Act, and used it as an argument confirmatory of the decision that he arrived at on an interpretation of the relevant provisions of the Divorce Act. The learned Judge pointed out how the law in this respect had developed in England and said that by virtue of s. 7 it must be held that there should now be in India a decree *nisi* and a period of six months before the decree became absolute.

[26] The last decision of our Courts is a decision of a Full Bench in *Wilkinson v. Wilkinson*, 47 Bom. 843 : (A. I. R. (10) 1923 Bom. 321 (F. B.)). This was a case dealing with the jurisdiction of the Divorce Court in India. That jurisdiction under s. 2 rested on residence; and the question was whether residence by itself was sufficient to confer jurisdiction or whether the principles of English law that domicile is necessary in some cases should be introduced into the Indian law by reason of s. 7 of the Indian Divorce Act. In delivering judgment Marten J. pointed out that the law in England was not well settled at the time when the Indian Divorce Act was enacted, and he proceeded to observe (p. 865):

"In my opinion the Indian Legislature intended by this clause to ensure reasonable uniformity between the various High Courts of this country and the English Courts, and as far as practicable to avoid the scandal of parties being regarded as married persons in India, though not in England, or perhaps as married persons in one Indian Province but not in another. I think it also intended to provide for the then uncertainty of the law on the subject, and for the possibility that the principles of the English Courts might be modified in course of time. Accordingly the Indian Courts are to give relief 'on principles and rules which . . . are as nearly as may be conformable to the principles and

rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief.' I draw particular attention to the words 'for the time being.' In my opinion, they were inserted to prevent the principles of law being rigidly fixed as at 1869."

Crump J. differed from the majority so far as the particular question before the Bench was concerned, but in his differing judgment at p. 906 the learned Judge observed :

".... it may be said what is then the scope of section 7 ? It is, in my opinion, a residuary section intended to provide for any matters which by inadvertence or otherwise are not expressly dealt with in the Act."

[27] We next have a decision of the Privy Council which of course is binding on all Courts in British India. That decision is to be found in *Iswarayya v. Iswarayya*, 58 I. A. 350 : (A. I. R. (18) 1931 P. C. 234). The question that arose for determination was whether under the provisions of S. 37, Divorce Act, where maintenance had been once fixed the Court had jurisdiction subsequently to increase it. The District Judge who tried the case held that there was no such jurisdiction under S. 37 but that such jurisdiction should be implied by reason of S. 7, as such jurisdiction existed in England. Their Lordships of the Privy Council held that upon a true construction of S. 37 there was such jurisdiction under the Indian Divorce Act itself. But having done so, Lord Russell of Killowen, who delivered the judgment of their Lordships, proceeded to consider the position under S. 7 of the Indian Divorce Act as confirmatory of the opinion then which their Lordships had formed as to the construction of S. 37. His Lordship then points out (p. 360) :

"Their Lordships fully realise that an Indian Act does not fall to be construed in the light of statutes enacted by another legislature. But this is a case in which the Indian Act makes express reference to the Court in England to which the relative jurisdiction of the Ecclesiastical Courts was transferred, and to the principles and rules on which that Court acts and gives relief. If it had been intended that the Courts in India, acting under this Act, should not have, in relation to a wife who had obtained a decree for judicial separation, the power which the Court in England enjoyed, of increasing the amount of her permanent alimony as and when the circumstances justified an increase, but that they should be restricted to the making of one order only for permanent alimony, their Lordships feel that this intention would have been declared in express and unequivocal terms."

[28] This decision to my mind is of very great importance in determining the question for decision before us. Here we have a power under the English law which was not conferred upon the Courts in India, or for the purpose of this argument at least was assumed not to have been conferred by S. 37, Divorce Act. One would have thought that under those circumstances it would be arguable that the Indian Legislature

had deliberately excluded such power from the provisions of the Indian Divorce Act itself. Not only was such an argument negatived, but their Lordships proceeded further to point out that if it was sought to exclude a power which existed in England at the date of the enactment of the Indian Divorce Act, there must be express words to that effect. To my mind, therefore, in a case like the present one, where at the date when the Indian Divorce Act was enacted there was no power in the Courts in England to grant permanent alimony in cases of nullity of marriage, if such a power which would come in under S. 7 was sought to be excluded, there must be clear words of exclusion.

[29] We next have two decisions of the Calcutta High Court. The first decision is to be found in *Ramsay v. Boyle*, 30 Cal. 489. The question for decision was whether on a petition for divorce on the ground of incestuous adultery, the alleged adulteress could be allowed to intervene. Such a power existed under the English law at the date when the Indian Divorce Act was passed but was not to be found in the Indian Divorce Act itself. The Calcutta High Court held that the alleged adulteress could not intervene. Chief Justice Maclean in delivering the judgment put the decision on two grounds, firstly, that the matter was of procedure only and, therefore, S. 7, Divorce Act did not apply, and, secondly, on the ground that where a power given expressly in the English Act is not inserted in the Indian Act, it could not be said to have been given by implication. So far as the first part of the argument is concerned, as I have said before, with respect to the learned Judge, I prefer the Bombay view that in matters of procedure in so far as procedure is not sufficiently prescribed by the Civil Procedure Code which applies under S. 45, Divorce Act, the Courts are entitled to apply the procedure and practice of the Court of matrimonial jurisdiction in England. So far as the judgment rests on the other ground that an express proviso in the English Act had not been inserted in the Indian Act, in my opinion, the judgment of their Lordships of the Privy Council in *Ishwarayya v. Iswarayya*, (58 I. A. 350 : A. I. R. (18) 1931 P. C. 234), to which I have just referred, disposes of that argument. With respect, therefore, to the learned Judges of the Calcutta High Court I am of opinion that this decision does not lay down good law.

[30] We next have a Full Bench decision of the Calcutta High Court, *Rajani Nath Das v. Nitai Chandra Dey*, 48 Cal. 643 : (A. I. R. (8) 1921 Cal. 820 (F.B.)) a decision on which Mr. Tara-porewala has strongly relied, as it is a decision directly on the question that we have got to

determine. In that case the second marriage of an individual was held to be null and void; and the question arose whether the Court had power to give permanent alimony to the reputed wife. A Full Bench of the Calcutta High Court held that they had no jurisdiction to make such an order. The decision was put on the ground that S. 37 omits to give such a power. It appears from the report that S. 7, Divorce Act, was referred to in argument; but it is strange that S. 7 is not even casually mentioned in the judgment of their Lordships. We have, therefore, no guide to determine what view their Lordships took of S. 7, Divorce Act. Moreover, it must be remembered that this case was decided in 1921, that is, full ten years before their Lordships of the Privy Council had expressed an opinion as to the true meaning to be given to S. 7, Divorce Act, in *Iswarayya v. Iswarayya*, (58 I. A. 350 : A. I. R. (18) 1931 P. C. 234), and indeed it was also given before the decision of a Full Bench of this Court in *Wilkinson v. Wilkinson*, 47 Bom. 843 : (A. I. R. (10) 1923 Bom. 321 (F B)) which I have referred to earlier. With very great respect, therefore, to their Lordships of the Calcutta High Court, I am not prepared to follow this decision and it affords little assistance to us in coming to a conclusion in the matter before us.

[31] Lastly a decision of the Madras High Court was relied upon, *Sumathi Ammal v. Paul*, 59 Mad. 518 : (A. I. R. (23) 1936 Mad. 324 (F B)). There, a Full Bench, Wadsworth J. dissenting, held that a decree that should be passed by the High Court in its original matrimonial jurisdiction in a petition for nullity of marriage should in the first instance be a decree *nisi* and not a decree absolute. Stone J. set out at great length the Privy Council case of *Iswarayya v. Iswarayya*, (58 I. A. 350 : A. I. R. (18) 1931 P. C. 234) and the observations of their Lordships therein and proceeded to apply the principles and rules of English law under S. 7 for the determination of the issue before them. In dealing with the argument that such an interpretation of S. 7 may involve importing into the Indian law grounds for divorce which are contrary to the provisions of the Indian Divorce Act the learned Judge pointed out that since adultery, cruelty or desertion had been dealt with as grounds for divorce in India on a somewhat different footing than that from which they were dealt with as grounds for divorce in England, it would be contrary to the provisions of the Indian Divorce Act to import the grounds as understood in England into the Indian Divorce Act. But his Lordship proceeded to observe at p. 529: "Had there not been a provision to the contrary,

we could have followed even that important change." It is not necessary for the purpose of the case before us to go to that length. But that was the view which Stone J. was prepared to take. Mockett J. observed (p. 533):

"Section 7 obviously contemplates that the principles and rules of the Indian Divorce Act should be subject to change and development because the words 'principles and rules on which the Court . . . acts' are qualified by the words 'for the time being'".

It is clear, therefore, that the view of the Madras High Court was that the object of S. 7 was to procure that the law of divorce under the Indian Divorce Act should keep pace with the law as it develops in England so far as such development does not violate any of the specific provisions of the Indian Divorce Act.

[32] Those are the Indian cases that have been cited before us with regard to the correct interpretation of S. 7, Divorce Act. But there is a case of the English Courts relied upon by Mr. Manekshaw which is of great assistance to us in that it was a case in which the analogous provision in S. 22, Matrimonial Causes Act, 1857, was interpreted. That is the case of *Goodden v. Goodden*, (1892) (L. R.) P. 1. Under S. 17, Matrimonial Causes Act, it was provided that permanent alimony could be granted by the Court where the decree was upon an application by the wife and the question that arose for decision was as to whether such permanent alimony could be granted where the application was by the husband, no such right having been specifically given under S. 17, Matrimonial Causes Act, 1857. Kay L. J. held that having regard to S. 22, as such a remedy had been granted by the Ecclesiastical Courts in the past, the Court was empowered to grant such a remedy notwithstanding the words of S. 17. At p. 3, the learned Judge observed:

"Unless there is something in them expressly taking away powers before exercised by the Ecclesiastical Courts, we should be reluctant to hold that the Divorce Court has a more limited authority than they had."

And again at p. 5 the learned Judge observed:

"It would be giving extraordinary and unnatural force to the language of S. 17 to say that it takes away or even negatives the jurisdiction of the Court to grant alimony where the decree for separation is made at the suit of the husband, and, in our opinion, that is not the true effect of the provision."

[33] To my mind, this is a case almost on all fours with the case before us; and following the same line of reasoning, although S. 37 does not in terms confer upon the Court power to grant permanent alimony in cases of nullity of marriage, since such power is to be found in the principles and rules on which the English Courts act to-day by virtue of S. 7 that power must be included amongst the powers given to us under the Indian Divorce Act.

[34] The same view was taken in a decision of the Oudh Court in *Mrs. Niblett v. Mr. Niblett*, A.I.R. (22) 1935 Oudh 133: (10 Luck. 627). The question there was whether S. 37 limited the jurisdiction of these Courts to grant alimony to a wife to cases of dissolution of marriage and decrees of judicial separation obtained by the wife only, since the words used in S. 37 are "any decree of judicial separation obtained by the wife." It was held that in a case of dissolution of marriage or judicial separation at the instance of the husband a similar order could be made. At p. 138 of the judgment the effect of S. 7, Divorce Act has been considered and it is pointed out that by reason of S. 7 the principles and rules which are applicable in the Divorce and Matrimonial Courts in England to-day must be given effect to.

[35] I am, therefore, of opinion that this Court has power to grant permanent alimony after a decree for nullity of marriage has been passed.

[36] Before concluding I will refer to an argument which was advanced by Mr. Taraporewala at the conclusion of his address. That argument was that the present case arises for determination under the Special Marriage Act. Section 17 of that Act provides that the Indian Divorce Act shall apply to all marriages contracted under this Act and any such marriage may be declared null or dissolved in the manner therein provided. The contention of Mr. Taraporewala is that the Divorce Act is in the first instance intended to apply to Christians only, while the Special Marriage Act applies to many other communities residing in India; and it would be a strange result if the provision of S. 7, Divorce Act, were to be made applicable by reason of S. 17 to parties who were married under the provisions of the Special Marriage Act. I realise that such consequences may well follow. But the remedy for it surely must be found by the Legislature and not by the law Courts. Section 7, as I have pointed out above, is a very extraordinary and an unusual section; and it is for the Legislature of a Free India to consider whether that section should be allowed to remain in an Indian Act so that we are for ever bound to the apron strings of English law so far as divorce under the Indian Divorce Act is concerned. It is further a matter for their consideration whether, assuming that S. 7 continues to remain a part of the Divorce Act, that section should be made applicable to parties who are governed in the first instance by the Special Marriage Act and to whom the Indian Divorce Act was made applicable as a mere matter of convenience. That, however, cannot affect the decision as to the true interpretation of S. 7, Indian Divorce Act.

[37] The result must, therefore, be, as the

learned Chief Justice has pointed out, that the appeal shall be dismissed with costs.

R.G.D.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 12 [C. N. 2.]

CHAGLA C. J. AND TENDOLKAR J.

Shree Laxmi Silk Mills, Bombay—Assessee v. The Commissioner of Excess Profits Tax Act, Bombay.

Income-tax Ref. No. 16 of 1947, Decided on 23rd March 1948.

Excess Profits Tax Act (15 [XV] of 1940), S. 2 (5) — Assessee carrying on business of silk manufacture and dyeing silk yarn—Dyeing plant remaining idle due to war conditions—Rent recovered by letting out dyeing plant is not income from assessee's business—Such income is not chargeable to excess profits—Income-tax Act (1922), S. 10.

If there is a commercial asset which is capable of being worked by the assessee himself for the purpose of earning profits, and the assessee, instead of doing so, either voluntarily allows someone else to use it on payment of a certain sum or is compelled by law to allow it to be used in such manner, then what he receives is income from business. But if the commercial asset has ceased to be a commercial asset in the hands of the assessee and thereafter he gets what he can out of it by letting it out to be used by others, then the rent he receives is not income from any business that he carries on; *Case law discussed.* [Paras 5 & 22]

The assessee was carrying on the business of manufacturing artificial silk cloth and of dyeing silk yarn. During the accounting period owing to difficulties on account of war the assessee stopped his dyeing activities as a result of which the dyeing plant remained idle for some time. Thereafter he let out the plant to another company on a monthly rent. The question was whether the amount of rent received by the assessee during the accounting period was profits from his business within the meaning of S. 2 (5), Excess Profits Tax Act, and therefore or otherwise liable to excess profits:

Held that although the dyeing plant was a commercial asset of the assessee it had ceased to be so due to difficulties created by the war and could not be used as such. Hence the income which the assessee derived therefrom by letting it out could not be considered to be the income of the assessee from his business within the meaning of S. 2 (5) and was not liable to excess profits. But Income-tax Act S. 12 (3) does not show such income not to be from business. [Paras 9, 19 & 21]

Annotation: ('46-Man.) Excess Profits Tax Act, S. 2 (5), N. 1.

C. K. Daphtary, Advocate-General and Sir Jamshedji Kanga — for Assessee.

G. N. Joshi and R. J. Kolah — for Commissioner of Income-tax.

Chagla C. J.—The assessee is running a silk mill known as Sri Lakshmi Silk Mills. Artificial silk cloth is manufactured in these mills. There is also a dyeing plant attached to the mills for dyeing silk yarn. The assessee's business was to manufacture silk cloth and also dye silk yarn. In the chargeable accounting period 1st January 1942, to 31st December 1943, the assessee, owing to the difficulty in obtaining silk yarn on account of the War, stopped his dyeing activities, as a result of which the dyeing plant remained idle

for some time. Therefore, on 20th August 1943, he let this plant to Messrs. E. Parekh & Co., on a rental of Rs. 4001 per month. The assessee received from E. Parekh & Co. Rs. 20,005 by way of rent for the period the plant was hired to the company during the accounting period. The Tribunal held that this sum of Rs. 20,005 was the assessee's income in the chargeable accounting period from business as defined in S. 2 (5), Excess Profits Tax Act. The assessee's contention was that the business fell under S. 12, Income-tax Act, being profits and gains from other sources, and, therefore, the Excess Profits Tax Act had no application to this income, and the question of law that has been submitted to us is whether in the circumstances of the case the assessee's income of Rs. 20,005 is profit from business within the meaning of S. 2 (5), Excess Profits Tax Act, and, therefore, or otherwise liable to pay excess profits tax.

[2] The point really lies in a very narrow compass. If this particular income is the result of the assessee's business and can be considered to be the profits and gains of that business, then undoubtedly this income is liable to pay excess profits tax. On the other hand, if it is not the profits or gains of the assessee's business and is income derived from other sources and falls under S. 12, Income-tax Act, then the Excess Profits Tax Act cannot apply to this income. It is undoubtedly an income for the purpose of the Income-tax Act. The question is whether it is an income from the assessee's business for the purpose of the Excess Profits Tax Act.

[3] The contention of Mr. Joshi on behalf of the Commissioner is that the dyeing plant is a commercial asset of the assessee's business and that commercial asset was put to a particular use by the assessee and that use was that instead of working the plant himself he let it out to some other persons and obtained rent for it and thereby this commercial asset yielded income to him in this particular manner. According to Mr. Joshi, it makes no difference whether a commercial asset yields income by being used by the assessee himself or it is being used by someone else. Mr. Joshi seems to be right but with this qualification that the commercial asset must be at the time it was let out in a condition to be used as a commercial asset by the assessee. If it has ceased to be a commercial asset, if its use as a commercial asset has been discontinued, then if the assessee lets it out, he is not putting to use something which is a commercial asset at the time.

[4] Now, on the facts found by the Tribunal it is clear that when the assessee let out this dyeing plant, it had remained idle for some time. He could not obtain silk yarn on account

of the War and, therefore, it was not possible to make use of it as a commercial asset as far as the assessee himself was concerned and it was only for that reason that he let it out to Messrs. E. Parekh & Co. I can understand the principle for which Mr. Joshi is contending that it makes no difference what an assessee does with a commercial asset belonging to him. He may use it as he likes. So long as it yields income it is the income of his business. Various cases have been cited at the Bar and I think that those cases though apparently conflicting are reconcilable if we accept this principle to be the correct principle and apply this ratio as the ratio emerging from these cases, and I will state the principle and the ratio again that if an assessee derives income from a commercial asset which is capable at the time of being used as a commercial asset, then it is income from his business, whether he uses that commercial asset himself or lets it out to somebody else to be used. But if the commercial asset is not capable of being used as such, then its being let out does not result in an income which is the income of the business.

[5] The first case to which I will refer is *Sutherland v. The Commissioners of Inland Revenue*, (1928) 12 Tax Cas 63. There the assessee purchased a steam drifter for the purpose of using it in herring fishing and during the War it was commandeered by the Admiralty and put to an entirely different use, namely a use which the Admiralty thought was essential in public interest for the purpose of prosecuting the War, and the question was whether the hire that the assessee received from the Admiralty could be considered to be his income from the business, and the Lord President in his judgment stated that when the assessee acquired the ship, he acquired her as an instrument, or, as the Lord Advocate phrased it, a commercial asset susceptible of being put to a variety of different uses in which gain might be acquired, and whichever of these uses it was put to by the appellant and profits earned, he was carrying on the same business, even although alterations were necessary on the vessel for the changed purpose, provided that each of these uses was one for which she as a ship was adapted. Therefore, to my mind the test that was applied in this case was that the ship was a commercial asset, and if it was put to any use, then the income derived from such use would be the income of the assessee. It is important to note that the ship in this case had not ceased to be a commercial asset as far as the assessee was concerned. I do not think the Advocate-General is right when he seeks to distinguish this case by saying that the ship was used for a purpose

which fell within the ordinary shipowning business, and the Advocate-General's contention is that in this case letting out of the dyeing plant is not part of the ordinary business of a silk mill-owner. I do not think that distinction is sound because the Lord President emphasises the fact that a ship can be put to a variety of different uses. In this case also the dyeing plant could be put to different uses. As a matter of fact in this case it is not put to a different use at all, because what is done on this machine is the same that was being done by the assessee himself. The only difference is that instead of his doing it himself he lets it out to someone else to do it.

[6] There is another decision in the same volume reported in *Ensign Shipping Co., Ltd. v. The Commissioners of Inland Revenue*, (1928) 12 Tax. Cas. 1169 : (139 L. T. 111). There the assessee obtained from Government compensation for loss of use of two ships which were detained in port by order of Government for a period of 15 and 19 days, and the Court held that the sum which the assessee received from Government was properly assessed to excess profits duty as a trading receipt by the assessee, and Sargant L. J. in his judgment felt that the case fell within the ratio of *Sutherland's case*, (1928) 12 Tax. Cas. 63 and he held that the sums paid to the assessee were sums in respect of the use and control of the ship though arrived at by way of compromise of that claim. Here again the ship was a commercial asset which was being put to a particular use and an income was derived by the assessee from that use.

[7] The third case relied on by Mr. Joshi is a decision of the Calcutta High Court, *Sadhu-charan Roy Chowdhry, In re*, (1935) 3 I. T. R. 114 : (A. I. R. (22) 1935 Cal. 344). In this case the assessee was the owner of a jute press and he leased it out to a private company and received a certain rent. The assessee was assessed in respect of this rent under S. 12 and his claim to an allowance for distribution in respect of the press was disallowed on the ground that the assessee was not carrying on any business and so S. 10 did not apply. The Court held that the letting of the jute press at a rent was a business and the assessee was entitled to the allowance claimed by him under S. 10. Here again the jute press was a commercial asset and the assessee instead of working it himself chose to have it worked by somebody else and received a rent himself and, therefore, the Court considered it to be an income from his business.

[8] There are two cases which have been relied on by the Advocate-General, both cases of the English Court, one case reported in *I.R.C.*

v. Broadway Car Co. (Wimbledon) Ltd., (1946) 2 ALL E. R. 609). In that case the assessee company carried on the business of motor car agents and repairers on land held on a lease from 1935 to 1956 at an annual rent of £750. In 1940 the company sub-let for 14 years two-thirds of the land at an annual rent of £1,150. The Commissioners of Income-tax held that the difference of £400 between the outgoing of £750 for the land retained and the incoming of £1,150 for the land disposed of was "income received from an investment," and the business not being one within the special categories mentioned in the Finance Act held that £400 was not taxable and the Court held that the amount was an investment. In this case it is important to note that owing to war conditions the business of the assessee had dwindled and he did not require more than one-third of the land for the purpose of his business. Therefore, the remaining two-thirds had ceased to be a commercial asset and therefore, the use of that two-thirds land could not be considered as a commercial asset being put to a particular use. It was on those facts that the Court came to the conclusion that the income received by letting out two-thirds of the land was an investment and not a trading receipt from the business of the assessee.

[9] In *I. R. C. v. Iles*, (1947) 1 ALL E. R. 798 assessee carried on the business of sand and gravel merchants on certain land and at the same time he granted licenses to three firms to enter his land and excavate gravel for themselves in return for which he received a royalty. The Court held that the royalties were not part of the profits of the assessee's business, because, in granting the licenses, the assessee was exploiting his rights of ownership in the land and was not carrying on his business of a sand and gravel merchant. Here also it is important to note that the assessee had excavated only a part of the land belonging to him and it was only with regard to this part that he was carrying on the business of a gravel merchant. The land that he let out on license was virgin soil which had not been excavated at all and, therefore, it could not be said that the land which was let out on license was a commercial asset of the assessee. Therefore, in this case although the dyeing plant was a commercial asset of the assessee, inasmuch as it had ceased to be a commercial asset because of the War and could not be used as a commercial asset, the income which the assessee derived by letting it out to Messrs. E. Parekh & Co. cannot be considered to be the income of the assessee from his business. The position would have been entirely different if although the assessee could have made use of this dyeing

plant he had chosen instead of working it himself to allow someone else to work it. Therefore, in my opinion, the Tribunal was wrong in the conclusion at which they arrived. I would, therefore, answer the question submitted to us in the negative. The Commissioner to pay the costs.

[10] **Tendolkar J.**—The facts giving rise to this reference are very few. The assessee owns the Sri Lakshmi Silk Mills and manufactures silk cloth. Attached to the mills there is a dyeing plant and this plant was used by the assessee for the purpose of dyeing silk yarn in connection with the manufacture of silk cloth in his mills. In the chargeable accounting period, which was 1-1-1943 to 31-12-1943, the assessee found that he could not work the dyeing plant owing to the difficulty of obtaining silk yarn on account of the War. As a result, the plant remained idle for some time; but on 20-8-1943, that is, almost eight months after the beginning of the accounting period, the assessee let out the plant to Messrs. E. Parekh & Co. on a rental of Rs. 4,001 per month. During the accounting period the assessee received by way of rental a sum of Rs. 20,005. The appellate Tribunal held that this amount was chargeable as income from business as defined in S. 2 (5) Excess Profits Tax Act. It is the assessee's contention that this is not income from business but it is income from other sources, and the question referred to us for decision is whether it is income from business or from other sources.

[11] Reliance is in the first instance placed by the Advocate-General on behalf of the assessee on S. 12 (3), Income-tax Act. Section 12 deals with "other sources" of income. Sub-section (3) thereof provides that where an assessee lets on hire machinery, plant or furniture belonging to him and also buildings, he shall be entitled to certain allowances under S. 10 (2), sub-cl. (iv) to (vii). The Advocate-General argues from this that this sub-section clearly shows that the letting out on hire of machinery or plant is not income from business, because, if it was, the provisions of S. 10 (2) would necessarily apply to it and, therefore, there would be no occasion for enacting S. 12 (3) at all. To my mind this argument is not tenable. Section 12 applies only when the income does not fall within any of the heads of income enumerated in S. 6. If it does fall within any of those heads, no question arises of the applicability of S. 12. Before, therefore, we can come to S. 12 (3) it must be found as a fact that the income we are dealing with is not income from any of the sources enumerated in S. 6. If it is income from business which is one of the sources enumerated in S. 6, then S. 12 has no application at all. Sub-section (3), therefore,

of this section does not help the Advocate-General at all.

[12] We have then to consider whether this rental received by the assessee is income from business. Before us several cases have been cited which are apparently conflicting and it shall be my endeavour to attempt to extract a ratio from these cases and to apply it to the facts before us. The first case that has been relied upon on behalf of the Income-tax Commissioner is the case of *Sutherland v. The Commissioner of Inland Revenue*, (1928) 12 Tax Cas 63. In this case the assessee had purchased a drifter with the intention of using it as a fishing vessel and in fact used it as such. This vessel was acquired by the Admiralty compulsorily on hire and a question arose as to whether the hire received from the Admiralty was or was not profits of the assessee's business. It was held by the Commissioners of Inland Revenue that they were part of the profits of the assessee's trade or business. The Lord President Strathelyde in his opinion said (p. 69) :

"When the appellant acquired the ship, he acquired her as an instrument, or, as the Lord Advocate phrased it, a commercial asset, susceptible of being put to a variety of different uses in which gain might be acquired, and whichever of these uses it was put to by the appellant and profits earned, he was carrying on the same business, even although alterations were necessary on the vessel for the changed purpose, provided that each of these uses was one for which she as a ship was adapted."

[13] The Lord President then proceeded to point out that fishing was in its nature a different industry from mine-sweeping, or patrolling or watching a gap in a boom, or the like. He then proceeded to state (p. 70) :

"It is the same piece of machinery, or implement, or commercial asset which is used to acquire profit. In short the business is that of the employment of a ship for gain in ordinary shipowning business."

[14] It is contended by the Advocate-General that the true ratio of this case is that the assessee had acquired a ship which could be used for any of the legitimate purposes for which a ship is used in the shipowning business. The acquisition of that ship although compulsorily by the Admiralty was under a charter party; and since such a use of the ship was an ordinary user in the shipowner's business, profits of such user were profits of the trade. With respect to the Advocate-General, I cannot agree that such is the true ratio of this case. The Lord President makes it plain that the business of this particular assessee was not to exploit the ship in any manner he could; it was to use the ship as a fishing vessel only, so that, the use of the ship in the manner in which it was actually used by the Admiralty was not contemplated by the assessee at all. The true

ratio as I conceive it to be is, that the ship was a commercial asset of the assessee. That asset was used to acquire profit, and since the commercial asset acquired profits, they were profits or gains of a trade or business. I may add—and this may be relevant when we come to consider the other cases relied upon by the Advocate-General—that in this case at the date of acquisition of this ship by the Admiralty the ship was capable of being used by the assessee for his own business of fishing and it had not ceased to be a commercial asset in any sense of the word.

[15] Reliance is next placed by counsel on behalf of the Income-tax Commissioner on the case of *Ensign Shipping Co., Ltd. v. The Commissioners of Inland Revenue*, (1928) 12 Tax Cas. 1169; (139 L. T. 111). In this case during a coal strike two ships belonging to the assessee company, which were loaded with cargoes of coal and were about to put out to sea, were detained in port by orders of Government for periods of 15 and 19 days. The company lodged a claim for compensation against Government apparently on the footing that the ships had been wrongfully detained and that they had thereby been deprived of profits which they would have earned if the ships had plied as they would ordinarily have. The claim for compensation was compromised and it was held by the Commissioners of Inland Revenue that the amount received by way of compensation was a trading receipt. Now, with very great respect to the Commissioners of Inland Revenue who decided this case, I am not at all sure that if a case on similar facts arose before me, I would take the same view as the Commissioners took in this case. It appears to me that what the assessee obtained in this case was purely compensation for an alleged wrongful act. The compensation was no doubt assessed or attempted to be assessed in terms of loss of freight which the company suffered by reason of the fact that they were not allowed to ply their vessels. But it appears to me difficult to say that, therefore, the amount of compensation is the equivalent of profits gained by running the ship if it had been allowed to be run. But assuming that the case was rightly decided, it was decided on the footing that what was obtained by the company in this case was really freight charges which they would have earned if they had been allowed to do so; and the ratio of this case must be found in the judgment of Sargant L. J. at p. 1180. He there states:

"It appears to me that on the facts of this case the Government substantially had the use and control of these two vessels for the periods in question, and that the sums paid to the company were sums paid in respect of that use and control, though arrived at by

way of compromise of that claim and a number of other claims. The case seems to me to be one within the case of *Sutherland v. Commissioners of Inland Revenue* (1928) 12 Tax Cas. 63 and accordingly the sum in question is a trade receipt, as the Commissioners have found, and is a trade receipt in respect of the period in question during which the vessel was under the control of the Government."

[16] The ratio of the case of *Sutherland v. Commissioners of Inland Revenue*, (1928) 12 Tax Cas. 63 which Sargant L. J. referred to, is the ratio which I have attempted to state earlier, viz. that if a commercial asset produces profits in fact, then such profits are business profits. I may notice again that in this case, at the date when the orders were served on the company prohibiting the vessels from leaving port, the vessels were actually loaded and were about to set out on a journey on which they would have earned freight. In other words, they were commercial assets in use at the time by the assessee and in no sense had they discontinued to be commercial assets to the assessee.

[17] The third case that is relied upon on behalf of the Income-tax Commissioner is a decision of the Calcutta High Court reported in *In re Sadhucharan Roy Chowdhry*, (1935) 3 I. T. R. 114 : (A. I. R. (22) 1935 Cal. 344). In that case the assessee who owned a jute press leased it out to a private company on rent and it was held that the rent received by the assessee was income from business. It appears that the assessee was assessed under S. 12 and the rent had been included in other sources of income with the result that he could not get the benefit of S. 10 (2) (vi) which he would have obtained if the income was from business. The Calcutta High Court held that the rent should have been assessed as business income and that the assessee was entitled to the benefit of S. 10 (2) (vi), Income-tax Act. In their judgment their Lordships of the Calcutta High Court placed reliance on the case of *Sutherland v. The Commissioners of Inland Revenue*, (1928) 12 Tax Cas. 63 and proceeded to observe (p. 119):

"In my opinion the letting of a jute press at a rent is as much a business as the letting of a ship to freight, or the letting of a motor-car or any other kind of machines, or machinery for hire."

[18] It must be noticed, with regard to this case as well, that it was perfectly open to the assessee in this case to work the jute press himself; and there is not the remotest suggestion in this case that the jute press had ceased to be of any use to the assessee or had ceased to be a commercial asset in that sense. If, instead of exploiting the jute press himself and earning profits, the assessee resorted to another method of earning profits by giving it out on rent, the profits he earned must necessarily in my opinion be the profits of the business.

[19] I then come to the cases relied upon by the Advocate-General. The first of these cases is a case reported in *I. R. C. v. Broadway Car Co., (Wimbledon), Ltd.*, (1946) 2 ALL. E. R. 609. In this case a company carried on business of motor car agents and repairers. For this purpose they had taken on lease land at an annual rent of £750 from 1935 to 1956. By the year 1940 the company's business had gone down owing to war conditions, with the result that not more than one-third of the land was required for the needs of their business. The remainder was sublet for 14 years at an annual rent; and the question for determination was whether the rents received by the company were profits of a business. It was held that they were not and that they were investments within the meaning of the English Finance Act. The true ratio of this case is that to the extent of two-thirds, the land had ceased to be a commercial asset to the assessee. He then determined to get what he could out of it and what he got was held not to be business profits. In the present case the Tribunal has found that the dyeing plant could not be used by the assessee for the purpose of his own mill because of difficulties created by War, with the result that the plant had ceased to be a commercial asset to the assessee at all.

[20] The next case relied on by the Advocate-General is a case reported in *I. R. C. v. Iles* (1947) 1 ALL. E. R. 798. In this case it was the business of the assessee to excavate gravel from land. He permitted four other companies to excavate gravel by paying royalties to him, and the question for determination was whether the royalties fell within Schs. A and B, English Act and were investments or were profits of business. It was held that they were investments within Schs. A and B. In this case, of course, it is quite plain that the portions of land on which the assessee allowed four other companies to excavate gravel, although adjoining the portion on which the assessee himself excavated gravel, were virgin soil on which the assessee had not carried on his business at all and what he let out was really land owned by him from which he derived profits.

[21] The ratio of all these cases to my mind is that if there is a commercial asset which is capable of being worked by the assessee himself for the purpose of earning profits, and the assessee, instead of doing so, either voluntarily allows someone else to use it on payment of a certain sum or is compelled by law to allow it to be used in such manner, then what he receives is income from business. But if the commercial asset has ceased to be a commercial asset in the hands of the assessee and thereafter he gets

what he can out of it by letting it out to be used by others, then the rent he receives is not income from any business that he carries on. I, therefore, agree that the question should be answered in the manner indicated by my Lord the Chief Justice.

K.S.

Answer in the negative.

A. I. R. (36) 1949 Bombay 17 [C. N. 3.]

CHAGLA C. J. AND TENDOLKAR J.

Prince Khanderao Gaekwar of Baroda and another—Assessee v. Commissioner of Income-tax, Bombay City.

Income-tax Ref. No. 13 of 1947, Decided on 16th March 1948.

(a) Income-tax Act (1922), S. 9 (1) (iv)—Annual charge — Assessee entitled under trust-deed to certain share of trust income — Registered agreement executed by assessee in favour of his mother agreeing to pay Rs. 6000 over and above that which he was liable to pay under trust deed — Payment made charge on assessee's property — Amount of Rs. 6000 is permissible deduction under S. 9 (1) (iv) — Contract Act (1872), S. 25 (1).

In order to determine whether the assessee is entitled to the allowance under S. 9 (1) (iv), the test to be applied is, is the property subject to a charge which is a valid and legal charge which can be enforced in a Court of law under which the assessee is bound to pay a certain amount recurring annually. [Para 3]

Under a deed of trust the assessee was to get each an eighth share in the income of the trust subject to a condition that in case their mother lived separate from either of them an amount of Rs. 9000 was to be paid to her out of the share of the assessee from whom she lived separate. Each of the assessee executed a registered indenture in favour of their mother who had begun to live separately from both of them by which each agreed to pay Rs. 15,000 to her and created a charge on their private properties in respect of the amount. The question was whether the excess amount of Rs. 6000 paid by the assessee to their mother was a permissible deduction from the assessee's income under S. 9 (1) (iv) :

Held that the charge created by the assessee in favour of their mother was supported by adequate consideration within S. 25 (1), Contract Act. The payment of the sum of Rs. 6000 by the assessee to their mother ceased to be a voluntary payment as soon as they entered into the agreement which the law could enforce as being supported by adequate consideration. The payment of the sum of Rs. 6000 was, therefore, a permissible deduction under S. 9 (1) (iv): *Dicta* in (1945) 13 I. T. R. 512 (Lah.) and (1945) 13 I. T. R. 500 (Lah.), *Dissent*. [Paras 3 and 4]

Annotation: ('46-Man.) Income-tax Act, S. 9, N. 3.

(b) *Precedents*—Case is authority only for what it decides and nothing beyond that. [Para 4]

Sir Jamshedji Kanga — for Assessee.

C. K. Daphlary, Advocate-General — for Commissioner of Income-tax.

Chagla C. J. — The assessee before us are the grandsons of H. H. the Maharaja Sir Sayaji Rao Gaekwad of Baroda. Sir Sayaji Rao created a family trust in April 1905 and he executed a deed of variation on 13th April 1928. Under Cl. 6 of the deed of variation each of his two grandsons, the assessee, gets an eighth share in the income

of the trust subject to a condition that if their mother Princess Kamaladevi should live separate from them or either of them then and in such a case the trustees should pay Rs. 9000 per year if she shall live separate from either of them and the sum of Rs. 18,000 if she shall live separate from both of them, and such sums of Rs. 9000 or Rs. 18,000, as the case may be, shall be deducted by the trustees from and out of the income or incomes of the said assessee, from whom Princess Kamaladevi may live separate. Princess Kamaladevi began to live separately from both the assessee from 1st April 1941. On 5th November 1942, both the assessee executed two separate indentures by which they both agreed to pay a sum of Rs. 15,000 each to their mother and each of the assessee by their respective indentures gave a charge on his own private property in respect of these sums of Rs. 15,000 which they had agreed to pay to their mother. In this reference we are not concerned with the sum of Rs. 9000 which was payable to the Princess under the provisions of the deed of trust. We are only concerned with the excess amount of Rs. 6000 which each of the assessee agreed to pay and in respect of which a charge is created on their private property.

[2] Now the assessee's contention as put forward by Sir Jamshedji is that this sum of Rs. 6000 is a permissible allowance under section 9 (4) [S. 9 (1) (iv)-(?)], Income-tax Act. He says that this is an annual charge not being a capital charge and that the amount of such a charge is an allowance permitted under S. 9 (4) [S. 9 (1) (iv)-(?) from the income which falls under the head of "Income from Property."

[3] The Tribunal held that the payment of Rs. 6000 by the assessee to their mother was a voluntary payment, that they were under no obligation to make this payment and that, therefore, the annual charge created by them in respect of this payment is not a charge which falls under S. 9 (4) [S. 9 (1) (iv)-(?)]. The Advocate-General has also taken up the same contention. Now a payment may be voluntary in the sense that before the creation of the charge there was no obligation on the person who created the charge to make the payment. It may be voluntary in the sense that the charge being without consideration it may not be enforceable in law. Now in this case there can be no doubt, looking to the two deeds executed by the assessee, that the charge created by them is a charge which Princess Kamaladevi can enforce in a Court of law. It is perfectly true that for the agreement to pay the sum of Rs. 6000 there is no consideration, but looking to the relationship between the assessee and the lady who has benefited under these indentures there can be

no doubt that this amount was agreed to be paid for natural love and affection and S. 25 (1), Contract Act, makes it clear that an agreement without consideration is void unless it is in writing and registered and is made on account of love and natural affection between parties standing in near relation to each other. This agreement to pay Rs. 6000 is in writing and the document is registered. But the Advocate-General goes further and his contention is that the annual charge contemplated in S. 9 (1) (iv) must be an over-riding charge; a charge which prevents the amount of the charge becoming income of the assessee and diverts the income from the hands of the assessee to the person who is the chargeholder. I am unable to accept that construction placed on S. 9 (1) (iv) because the whole scheme of that sub-section is that certain allowances are permitted to the assessee out of the income which he derives from his property. Therefore, with regard to these allowances we must proceed on the assumption that they are all the income of the assessee. They all constitute his income, and it is because of the allowances which are given to him that no tax is payable on certain portion of his income. Under the other parts of sub-cl. (iv) interest on mortgage or capital charge is an allowance, ground rent is an allowance, interest paid on borrowed capital for acquiring, constructing, repairing, renewing or reconstructing the property is an allowance and all these allowances form part of the income of the assessee. Whether originally the assessee was bound or not to pay this amount to his mother, once he enters into this agreement and an enforceable charge on the property ensues, then the assessee is entitled to the allowance under sub-s. (iv) of S. 9 (1). The test to be applied is, is the property subject to a charge which is a valid and legal charge which can be enforced in a Court of law under which the assessee is bound to pay a certain amount recurring annually and if we apply that test to the facts of the present case, there can be no doubt that the assessee are under a legal obligation to pay to their mother Princess Kamaladevi a sum of Rs. 6000 each every year, failing which it would be open to her to enforce the charge on their respective properties.

[4] Reliance was placed on the decision of the Privy Council in *Bejoy Singh Dudhuria v. Commissioner of Income-tax, Calcutta*, 35 Bom. L. R. 811 : (A. I. R. (20) 1933 P. C. 145). That decision was given before the Act was amended in 1939 and the present provision was introduced with regard to certain burdens on the property. In that case the assessee had succeeded to the ancestral family estate on the death of his father. Then a step-mother brought

a suit for maintenance against him in which a consent decree was obtained directing the assessee to make a monthly payment of a fixed sum to his step-mother and declaring that the maintenance was a charge on the family estate in the hands of the assessee. The assessee claimed that the amounts paid by him to his step-mother under the decree should be excluded. The Privy Council held that the liability of the assessee under the decree did not fall within any of the exemptions or allowances conceded in ss. 7 to 12, Income-tax Act. But they held that this sum was not the income of the assessee at all because the decree of the Court had diverted that income from the hands of the assessee and had directed it to the step-mother and, therefore, to that extent the assessee received that amount on her behalf and it was not his income. As their Lordships pointed out, it was not a case of the application by the assessee of part of his income in a particular way; it was rather an allocation of a sum out of his revenue before it became income in his hands. In this case the Advocate-General is perfectly right that there is no diversion of the income of the assessee by any overriding factor, but, as I have stated before, we are now considering a case of an assessee receiving income from his property and that income being subject to certain allowances permissible under the statute. The Advocate-General has also relied on the decision of *Hira Lal, In re*, (1945) 13 I. T. R. 512 (Lah.). In that case widows were granted maintenance allowances under an award in lieu of their share in the family property and the payment of allowances was made a charge on the property of the assessee and his brothers. The Court held that the payments made by the assessee in discharge of his share of the liability to the widows could not be taxed as income but must be excluded from his assessment as the payments were obligatory and subject to an overriding charge. The learned Advocate-General relied on a passage in the judgment of the Court where they described the *ratio decidendi* of the cases of this character to be that, if the payment is voluntary, it must be included in the income of the assessee; but if the charge is obligatory, i. e., subject to an overriding charge such as a decree, the sum so charged must be excluded from the income of the payer. Now, with great respect to the Court, all that they were called upon to decide was whether on the facts before them the particular payment to the widows was a charge on the property and, therefore, permissible deduction under section 9 (1) (iv) of the Act, and on the facts before them there can be no doubt that there was a permissible allowance. The *ratio decidendi* which the Court laid down did

not strictly arise out of the facts before them and is of a very wide application. It is a well established principle of interpretation of judicial decisions that a case is an authority only for what it decides and nothing beyond that. Therefore, while we agree with the decision itself, we feel that the so-called *ratio decidendi* is merely an *obiter* to which the Lahore High Court has given expression. To the same effect is a decision of *Estate of Lala Shankar v. Commr. of Income-tax*, 1944-13 I. T. R. 500 (Lah.) where also the Lahore High Court has given expression to the same *ratio*. To my mind the payment of this sum of Rs. 6,000 by the assessee to their mother ceased to be a voluntary payment as soon as they entered into the agreement which the law could enforce as being sufficiently supported by adequate consideration. It is not disputed by the Advocate-General that if the charge was supported by adequate consideration, undoubtedly the assessee would be entitled to the allowances under sub-s. (4) [sub-s. 1 (iv) (?)]. If so, why is natural love and affection not an equally good consideration? Law looks upon it as a good consideration, and if in this case it can be supported by that consideration, the payment of Rs. 6,000 stands on the same footing as if there was pecuniary consideration for the payment of this amount by the assessee.

[5] We, therefore, do not agree with the Tribunal when they take the view that the payment of Rs. 6,000 is not a permissible allowance, and we would, therefore, answer the question submitted to us in the affirmative.

[6] The Commissioner must pay the costs of this reference.

K.S.

Answer in the affirmative.

A. I. R. (36) 1949 Bombay 19 [C. N. 4.]

CHAGLA C. J. AND TENDOLKAR J.

Mahomed Yasin Nurie—Appellant v. Shripat Amrit Dange—Respondent.

O. C. J. Appeal No. 38 of 1947, Decided on 7th April 1948, from judgment of Bhagwati J. reported in, A. I. R. (35) 1948 Bom. 20.

(a) Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, S. 4—Election petition—Notification appointing Commissioners issued by Government of Bombay—Notification is valid and Commissioners were validly appointed—Government of India Act (1935), S. 59—General Clauses Act (1897), Ss. 3 (27a) and 4-A: A. I. R. (35) 1948 Bom. 20, REVERSED.

A notification under Cl. 4 of part III of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, appointing Commissioners to try an election petition, issued by the Government of Bombay, is a valid notification and tribunal appointed under it is validly appointed: A. I. R. (35) 1948 Bom 20, REVERSED.

[Para 8]

Such an appointment is made by the Governor exercising his individual judgment as it has to be made under Cl. 4 of part III of the Order in Council of 1936.

Constitutionally, the Government of Bombay is the Governor and his Ministers. The Governor is not an authority or a person outside the Government of Bombay but forms part of the Government of Bombay, and whether he acts in his discretion or exercising his individual judgment, he is a part and parcel of the constitutional machinery that constitutes the Provincial Government or the Government of Bombay. [Para 4]

Further, the notification itself states that the Government of Bombay has appointed the Commissioners in pursuance of the provisions of Para 4 of Part III of the Order in Council of 1936. Therefore, by reference these provisions are incorporated in the Notification itself. Those provisions make it clear that the appointment has to be made by the Governor exercising his individual judgment and there is no reason to presume that an official act was done otherwise than properly and in accordance with law. [Para 4]

According to S. 4A read with S. 3 (27a), General Clauses Act (as amended in 1937 by A. O.) also, which has to be looked to in order to interpret the expressions occurring in the Order in Council of 1936, and the Notification issued pursuant to the provisions of that Order, the Government of Bombay means Governor exercising his individual judgment. [Paras 5, 6]

No doubt, consistent with S. 59 (1) and the rules of business framed under S. 59 (2), Government of India Act, 1935, the notification ought to have used the expression "Governor of Bombay" and not "Government of Bombay". But these provisions with regard to the use of that expression are merely directory and procedural in character. Therefore, if the order is actually made by Governor exercising his individual judgment, the mere fact that it is not expressed to be so made in the order itself does not vitiate the notification : A. I. R. (34) 1947 Bom. 361, *Foll.*; Misc. No. 69 of 1947, *Decided* on 12th May 1947, *Rel. on.* [Para 7]

(b) General Clauses Act (1897) (as amended by A. O. in 1937), S. 3 (27a)—Order in Council of 1936, is Indian Law.

"Indian law" includes the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936 : A. I. R. (17) 1930 Mad. 896, *Rel. on.* [Para 5]

H. D. Banaji and N. N. Nathwani—for Appellant.
C. K. Daphlary, Advocate-General — for Sir H. V. Divatia, D. V. Vyas and M. S. Noronha, Members of the Tribunal.

L. M. Jhaveri—for Respondent.

Chagla C. J.—This is an appeal from a judgment of Bhagwati J., by which he directed a writ of *certiorari* to issue against the Election Tribunal appointed by the Government of Bombay. There was an election for the seat allotted to the Bombay City and Suburban Textile Unions Constituency in the Bombay Legislative Assembly and the election was held in 1946. As a result of that election Mr. Dange was declared successful. Mr. Nurie then presented an election petition to His Excellency the Governor against the said election praying that it may be declared that he, the said Mr. Nurie, had been duly elected a member of the Bombay Legislative Assembly from that constituency and not Mr. Dange. On that petition being presented the Government of Bombay issued a notification dated 3rd July 1946,

by which they appointed Sir H. V. Divatia, Mr. D. V. Vyas and Mr. M. S. Noronha Commissioners, with Sir H. V. Divatia as the President of the Tribunal, for the trial of that petition, and it is the validity of this Tribunal, that was challenged by Mr. Dange and a petition was filed by him before Bhagwati J., for a writ of *certiorari* and Bhagwati J., accepted that petition. Before Bhagwati J., various questions were argued as to the maintainability of the application. To Mr. Dange's petition the Commissioners were made party respondents. Mr. Nurie was respondent 4. Respondents 5, 6 and 7 were the other contesting candidates; the name of respondent 8 was struck off; the returning officer was joined as respondent 9. The Commissioners challenged the maintainability of the petition on various grounds and various preliminary issues were tried and decided by the learned Judge all against the contesting respondents, and the learned Judge ultimately came to the conclusion that the notification issued by the Government of Bombay was not a valid notification and that the three members of the Election Tribunal were not duly and properly appointed members. In this appeal we have not gone into the various interesting questions discussed by the learned Judge in his judgment. We have heard Mr. Banaji on the merits of the question, and as we have come to the conclusion that the learned Judge was not right in coming to the conclusion that the notification was not valid and the members of the Tribunal were not validly appointed, it is unnecessary to consider other questions as to the maintainability of the petition.

[2] Now the position with regard to the notification is this. Under S. 291, Government of India Act, 1935, in so far as provision with respect to the matters therein mentioned is not made by that Act, His Majesty in Council may from time to time make provision with respect to those matters or any of them, and one of those matters is referred to in cl. (g) of that section, viz. corrupt practices and other offences at or in connection with elections under the Act. Pursuant to this section an Order in Council was issued by His Majesty which is known as the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936, and under cl. 4 of Part III of that Order it was provided that unless the Governor, exercising his individual judgment dismissed a petition for non-compliance with the prescribed requirements, he should, exercising his individual judgment, appoint as Commissioners for the trial of the petition three persons who are or have been or are eligible to be appointed Judges of a High Court and should appoint one of them to be the President. It was under the provision of this clause

that the notification dated 3rd July 1946, was issued. Now the notification is challenged on two grounds. It is urged that whereas the Commissioners have to be appointed by the Governor himself exercising his individual judgment, the notification in terms states that the appointment has been made not by the Governor exercising his individual judgment but by the Government of Bombay. The notification is also challenged on the ground that the appointment must be expressed in the notification itself to be by the Governor of Bombay, and inasmuch as that expression is not used, the notification is bad.

[3] Now it is necessary to understand what is the constitutional position of the Governor of a Province under the Government of India Act, 1935. The executive authority of the Province is to be exercised on behalf of His Majesty by the Governor, and the scheme of the Act is that the Governor may act according to the advice of his ministers, or he may act according to his discretion, or he may act exercising his individual judgment. Unless he acts in his discretion a statutory duty is cast upon him to consult his ministers, although when he is acting exercising his individual judgment, he may not agree with the advice tendered to him by his ministers. Section 59 (1), Government of India Act, provides that all executive action of the Government of a Province shall be expressed to be taken in the name of the Governor, and sub-cl. (2) of that section provides that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the authority of the order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Now under sub-cl. (2) business rules have been framed and R. 12 provides that all orders and instruments made or executed by or on behalf of the Government of Bombay shall be expressed to be made by or by order of the Governor of Bombay. Rule 13 provides that save in cases where an officer has been specially empowered to sign an order or instrument of the Government of Bombay, every such order or instrument shall be signed by either the Secretary, the Joint Secretary, the Deputy Secretary, the Under-Secretary or the Assistant Secretary to the Government of Bombay and such signature shall be deemed to be the proper authentication of such order or instrument. In this case there is no difficulty about the signing of the order because it is signed by the order of the Governor of Bombay by the Secretary Mr. P. N. Moos. Section 59 (1) and R. 12 are not complied with inasmuch

as the notification is not expressed to be made by or by order of the Governor of Bombay. It is in fact expressed to be by the Government of Bombay.

[4] I shall first consider the question which is the real question of substance, whether on the face of this notification it can be stated that the provisions of cl. 4 of Part III of the Corrupt Practices and Election Petitions Order of 1936 has not been complied with, or, in other words, that the appointment has not been made by the Governor exercising his individual judgment as it has to be made under the provision of that clause. Now Mr. Jhaveri appearing for Mr. Dange has sought to make a distinction between the Government of Bombay and the Governor exercising his individual judgment, and his contention is that when the Government of Bombay makes the appointment, an entirely different entity is making the appointment from the entity contemplated by cl. 4, which is the Governor exercising his individual judgment. In my opinion that contention is entirely fallacious. Constitutionally Government of Bombay is the Governor and his Ministers. Governor is not an authority or a person outside the Government of Bombay, but forms part of the Government of Bombay, and, as I have pointed out earlier, whether he acts in his discretion or exercising his individual judgment, he is a part and parcel of the constitutional machinery that constitutes the Provincial Government or the Government of Bombay. Further, it has to be noted that the notification itself states that the Government of Bombay has appointed the three persons as members of the Tribunal in pursuance of the provisions of para. 4 of Part III of the Government of India (Provincial Elections) (Corrupt Practices and Election Petitions) Order, 1936. Therefore, by reference these provisions are incorporated in the notification itself, and when we turn to these provisions it is clear that the appointment has to be made by the Governor exercising his individual judgment, and there is no reason to presume that an official act was done otherwise than properly and in accordance with the law.

[5] Apart from the constitutional position, according to the rules of interpretation to which I shall now refer, it is clear that the Government of Bombay means Governor exercising his individual judgment. An Order in Council was passed called (Adaptation of Indian Laws) Order, 1937, and various Acts were adapted and a list is given of those Acts in the schedule appended to that Order. One of the Acts that were so adapted was the General Clauses Act. This Order brought about two important changes as far as we are concerned in the General Clauses Act. One was to enact S. 4A which provided that the definitions

in S. 3 of the various expressions including the one with which we are concerned—"Provincial Government"—shall apply, unless there was anything repugnant in the subject or context, to all Indian laws. It also enacted cl. (27a) to S. 3 which defines "Indian Law" as including any law, ordinance, order, bye-law, rule or regulation passed or made at any time by any competent Legislature, authority or person in India. It is important to note that by another Order which was also passed by His Majesty-in-Council under the Government of India Act, 1935, it was provided that the Interpretation Act, 1889, which corresponds to our General Clauses Act, and which is usually resorted to in order to interpret expressions appearing in Parliamentary Statutes, shall not be applicable to interpret the Government of India Act, 1935, or the Government of Burma Act, 1935 nor, save as therein mentioned, for the interpretation of any Order in Council made under either of those Acts, notwithstanding that that Order may provide generally that the Interpretation Act, 1889, shall apply for the interpretation thereof, as it applies for the interpretation of the Acts of Parliament. Therefore, although the Order of 1936 did provide that the Interpretation Act of 1889 was to apply for the interpretation of that Order, by reason of this Order of 1937 the effect of that provision was nullified and it is the General Clauses Act which has to be looked to in order to interpret expressions occurring in the Order in Council of 1936. Now under S. 4A, General Clauses Act, the definition of "Provincial Government" is to apply to all Indian laws and "Indian Law" is defined in the newly added cl. (27a) and the question is whether the Order in Council of 1936 is an Indian law within the meaning of that sub-clause. The question we have to consider is whether any competent Legislature, authority, or person in India refers to a Legislature, authority or person situated in British India, or a Legislature, authority or person which is competent in British India. I must frankly confess that the interpretation is not free from doubt, but, considering the fact that the Interpretation Act is no longer to apply to this Order in Council the better view seems to be that "Indian Law" includes the Order in Council of 1936. The same view as to the meaning of Indian law has been taken by the Madras High Court in *Venkataratnam v. Secretary of State for India*, 53 Mad. 979 : (A. I. R. (17) 1930 Mad 896) where at p. 997 Venkatasubba Rao J. took the view that there was no reason to confine the meaning of "authority in British India" to an authority situate in British India only. Now under the General Clauses Act "Provincial Government" is defined as meaning :

"in a Governor's Province, the Governor acting or not acting in his discretion, and exercising or not exercising his individual judgment, according to the provision in that behalf made by and under the Government of India Act, 1935."

[6] Mr. Jhaveri has attempted to argue that, although the expressions used in the Order of 1936 may be interpreted under the General Clauses Act, it would not be proper to do so with regard to the expressions used in the notification. Now the notification has been issued pursuant to the provisions of the Order of 1936 and it has the same legal effect as the Order itself. It really forms part of the Order and therefore I see no reason why, if in interpreting the expressions in the Order of 1936 itself we may turn to the General Clauses Act, when construing the notification issued under the Order we are prevented from doing so. In my opinion when the notification states that the Government made the appointment it means the same thing as if it had stated that the Governor made the appointment exercising his individual judgment.

[7] The next question is a question of form and there can be no doubt that as far as the expression "Government of Bombay" is concerned it is not the expression which is required by S. 59 (1) or by the rules of business framed under S. 59 (2), Government of India Act. Consistent with these provisions the notification ought to have used the expression "Governor of Bombay" and not "Government of Bombay." A question then arises for determination whether the use of any incorrect expression or the use of an expression contrary to what is provided under the business rules makes the notification invalid. We may approach the subject from a different point of view and the question we will have to consider is whether the provision with regard to the use of a particular expression is a mandatory provision or merely a directory provision. If it is a mandatory provision, then, undoubtedly, the notification is bad, but if it is merely a directory provision and procedural in character, then the non-compliance with such a direction would not render the notification invalid. There is a decision of our own Court, which was confirmed by the Federal Court in appeal, dealing with this very point. In fairness to Bhagwati J., I must say that the Federal Court decision was not before him when he decided this case although the decision of this Court was before him which he attempted to distinguish on the facts of the case. This Court's judgment in the case of *Emperor v. J. K. Gas Plant & Co., Ltd.*, 49 Bom L. R. 352 : (A. I. R. (34) 1947 Bom. 361 : 48 Cr. L. J. 902) and the orders which Stone C. J. and Lokur J. were considering were orders issued under the Defence of India Rules. The

orders under R. 81 (2), Defence of India Rules, had to be made by the Central Government or the Provincial Government. In that particular case the orders were issued by the Central Government. Stone C. J. in his judgment referred to the definition of "Central Government" in the General Clauses Act which in the context meant "Governor-General-in-Council." It was contended that under S. 40 (1), Sch. 9 to the Government of India Act, 1935,

"all orders and other proceedings of the Governor-General-in-Council shall be expressed to be made by the Governor-General-in-Council, and shall be signed by a Secretary to the Government of India, or otherwise as the Governor-General-in-Council may direct, and, when so signed, shall not be called into question in any legal proceeding on the ground that they were not duly made by the Governor-General-in-Council."

The argument there advanced was identical with the one advanced before us that inasmuch as the statute provides for all orders issued by the Governor-General-in-Council to be expressed as made by him, non-compliance with that provision rendered the orders invalid. Stone C. J. came to the conclusion that S. 40 (1), Sch. 9, was a procedural section, and he, therefore, took the view that there was no scope in that section for a construction which would vitiate orders actually made by the Governor-General-in-Council but not expressed to be made according to the letter of the sub-section. That is exactly the position here. If this order is actually made by the Governor exercising his individual judgment but if it is not expressed to be so made in the order itself, that does not vitiate the notification. The Federal Court's judgment in the same case is reported in the same volume at p. 591: (A.I.R. (34) 1947 F.C. 38). Spence C. J. in his judgment on this point at first sounds a very salutary note of warning that the Constitution Act should be given a liberal construction. He then points out that when you find a direction in a provision of a statute and it is not suggested what the result would be of non-compliance with such a direction, then the proper canon of construction is to treat that provision as merely directory and not mandatory. The Federal Court, therefore, agreed with the view taken by the Bombay High Court that the provision with regard to the manner in which the orders issued under the Defence of India Rules ought to be expressed were merely directory and not mandatory. In my opinion, and with respect to the learned Judge below, it is not possible to distinguish the judgments in this case from the facts before us. In no two cases can we have identical facts. The facts must differ but what we have to deduce is the principle underlying the decision and the ratio on which the decision was based, and it is impossible for me to say that

the ratio in the two judgments does not apply to the case before us.

[8] I may also point out that Dixit J. had considered this very question in *The Empire of India Life Insurance Co. Ltd., v. Sir Harsidhbhai Divatia*, (1947) Misc. No. 69 of 1947, decided by Dixit J., on 12th May 1947 where a notification issued under the Defence of India Act appointing Sir H. V. Divatia to try an industrial dispute was unsuccessfully challenged on the identical ground. Therefore, in my opinion the notification of 3rd July 1946, was a valid notification and the Tribunal appointed under it was validly appointed. The learned Judge was not right in coming to the conclusion that a writ of *certiorari* should issue in order to quash the proceedings pending before that Tribunal.

[9] There is one more thing which I should like to refer to and that is with regard to certain remarks which the learned Judge made in the course of his judgment and to which strong exception is taken by the learned Advocate General who appears on behalf of the Commissioners. This is the passage in the learned Judge's judgment:

"They, however, for reasons best known to themselves, not only appeared by counsel but took up partisan attitude trying to substantiate their appointment by arguing the various points which I have dealt with above and by submitting for my consideration the various preliminary objections which I have dealt with in my judgment."

Then he proceeds to make an order of costs against them and says that if these respondents had taken up a non-contentious attitude he should not have made any order of costs against them. Now a little earlier in his judgment the learned Judge very clearly says:

"There is not the slightest aspersion which can be cast against the honesty, integrity or the status of respondents 1, 2 and 3, who have been appointed Commissioners in the matter of the election petition."

The learned Judge pays a compliment to the Governor by saying:

"No better choice . . . could have been made by the Governor exercising his individual judgment in the matter of the appointment of Commissioners."

It is difficult for us to understand what made the learned Judge to accuse these respondents of partisanship. It is true that they did take up in one sense of the term contentious attitude, and when their appointment was challenged and when it was suggested that the notification was invalid they did try to support both the notification and their appointment, and as it now turns out they did so rightly. But from that it does not follow that they were in any sense of the term partisan. Partisan implies a wrong motive. It implies an improper bias in favour of one party to the prejudice of another,

and we are sure that the learned Judge could not have possibly meant that the Commissioners were biased either in favour of Mr. Nurie or in favour of Mr. Dange. No worse accusation can be made against a Judge or a person exercising judicial authority than to say that he is partisan. A man is incapable to act as a Judge if he cannot maintain judicial detachment in any case which comes before him and which he tries and we can quite understand the resentment felt by these Commissioners which has been voiced by the Advocate-General. We see nothing on the record whatever to justify this charge and, as I stated before, we are certain that the learned Judge did not intend to use the expression in the sense in which it is normally understood.

[10] The result will be that the appeal will be allowed. The order of the learned Judge issuing the writ of *certiorari* will be set aside and the proceedings will be restored to that Tribunal. Mr. Dange to pay the costs of this appeal as also of the hearing of the petition in the lower Court. The order made by the learned Judge against respondents 1, 2 and 3 for costs of the petition also vacated. Mr. Dange should also pay the costs of respondents 1, 2 and 3 of this appeal and also of the hearing of the petition in the lower Court. Separate sets of costs allowed.

V.B.B.

Appeal allowed.

A. I. R. (36) 1949 Bombay 24 [C. N. 5.]

CHAGLA C. J. AND TENDOLKAR J.

Madanlal Dharnidharka — Assessee v. The Commr. of Income tax, Bombay City.

Income-tax Ref. No. 27 of 1947, Decided on 22nd March 1948.

(a) Income-tax Act (1922), S. 66 (1) and (5) (as amended in 1939)—Question apparent on order or which can be raised on facts stated in such order—Question is one arising out of such order—Question raised by Tribunal but not dealt with by it can be answered by High Court.

There is no reason to confine the jurisdiction of the High Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. A question of law must be said to arise out of the order of the Tribunal if such a question is apparent on the order itself or it can be raised on the facts found by the Tribunal and which are stated in the order. The High Court has no jurisdiction to decide questions which have not been referred by the Tribunal. Where, however, the Tribunal has actually raised a question of law and has referred it to the High Court for its opinion although the point was not dealt with by the Tribunal, it is not competent to a party to challenge the jurisdiction of the High Court to answer the question in view of S. 66 (5) : A. I. R. (22) 1935 Bom. 170 and A. I. R. (35) 1948 Bom. 72 (F. B.), *Rel. on* ; A. I. R. (35) 1948 Mad. 181, *Dissent*.

[Paras 1 and 3]

Annotation : ('46-Man.) Income-tax Act, S. 66, N. 2 and N. 19.

(b) Income-tax Act (1922), Ss. 4 (1) (b) (iii), 10, 12 and 24, proviso — Assessee resident in accounting year but non-resident in previous years — Remittance in accounting year of income from business earned in previous years outside British India liable to tax under S. 4 (1) (b) (iii) as income from other sources — Loss incurred in business outside British India in accounting year cannot be set off against such remittance by reason of S. 24, proviso.

The assessee was taxed in respect of the assessment year 1944-45 on Rs. 2,01,000. The accounting year in respect of the assessment was the Maru year 1999-2000 beginning with 9th November 1942. The assessee commenced business in Bombay from that date. The assessee was a non-resident in the previous years. The assessee received Rs. 2,01,000 during the accounting year out of the profits made by him in Indore State in the preceding years. He suffered a loss of Rs. 73,779 in his business in Indore State, in the accounting year :

Held, that (1) the amount of Rs. 2,01,000 was liable to be taxed under S. 4 (1) (b) (iii) as a remittance. The fact that the remittance represented income earned by a non-resident was irrelevant. [Para 4]

(2) The loss of Rs. 73,779 could not be set-off against the sum of Rs. 2,01,000 by reason of the proviso to S. 24 as the sum of Rs. 2,01,000 could not fall under S. 10 as income from business but fell under S. 12 as income from other sources and the sum of Rs. 73,779 was a loss falling under the head business. [Para 5]

Annotation : ('46-Man.) Income-tax Act, S. 4, N. 1, 7 and 8.

R. J. Kolah — for Assessee.

C. K. Daphtary, Advocate-General and G. N. Joshi — for the Commissioner.

FACTS.—The Appellate Tribunal referred the following questions of law to the High Court :

"(1) Whether the remittance of Rs. 2,01,000 out of profits, made by the assessee in the years preceding the Maru year 1999-2000 as a non-resident, could be included under S. 4 (1) (b) (iii), Income-tax Act, in his total income of the year of account in which he was a resident in British India ?

(2) Whether the loss of Rs. 73,779 suffered by the assessee in the Maru year 1999-2000 could be set-off against the remittance of Rs. 2,01,000 referred to above ?"

Chagla C. J.—This is a reference in respect of the assessment year 1944-45. The assessee was held to be a resident for that year. The previous year or the accounting year in respect of this assessment year was the Maru year 1999-2000 beginning with 9th November 1942. The assessee commenced doing business in Bombay from that date and there was a credit entry in his books of account on that very day for a sum of Rs. 51,000. On 8th January 1943, there was another credit entry for a sum of Rs. 1,50,000. In that year the assessee suffered a loss of Rs. 73,779 in his business which he was carrying on at Indore. The two questions which are submitted for our determination are concerned with these two sums of Rs. 2,01,000 and Rs. 73,779. With regard to the sum of Rs. 2,01,000 the assessee's case before the Department was that he was adopted by his uncle many years ago, that his uncle left a large fortune, and it was out of this large

fortune that this amount was brought into British India. The Appellate Assistant Commissioner taxed this amount of Rs. 2,01,000 under S. 4 (1) (b) (iii), Income-tax Act. It was found by him that after the death of his adoptive uncle the assessee did business at Indore and he failed to produce his books of account relating to that business. The Tribunal to which an appeal was preferred from the decision of the Appellate Assistant Commissioner also held that the sum of Rs. 2,01,000 represented remittances and profits received in British India by the assessee during the year and they were rightly taxed under S. 4 (1) (b) (iii). With regard to the sum of Rs. 73,779 the Tribunal held that that loss could not be set off against the sum of Rs. 2,01,000. The first question that we have to consider is whether the remittance of Rs. 2,01,000 out of profits made by the assessee in the years preceding the Maru year 1999-2000 as a non-resident could be included under S. 4 (1) (b) (iii), Income-tax Act, in his total income of the year of account in which he was a resident in British India. It will be noticed that the point sought to be taken up by the assessee in this question is that he was a non-resident during the year when the profits and the income of the business arose in the Indian State. Now this particular question was included in the grounds of appeal before the Appellate Tribunal, but it was not argued before them, and a question of considerable importance affecting the jurisdiction of this Court has been raised by the Advocate-General that, as this question was not dealt with by the Tribunal, it was not open to the Tribunal to raise it and it is not open to us to decide it. In my opinion it is necessary clearly to re-state the jurisdiction of this Court. This is not a Court of Appeal. This Court merely exercises an advisory jurisdiction. Its judgments are in the nature of advice given on the questions submitted to it by the Tribunal. Its advice must be confined to questions referred by the Tribunal to this Court and those questions must be questions of law which must arise out of the order made by the Tribunal. Now, looking at the plain language of the section apart from any authority, I should have stated that a question of law arose out of the order of the Tribunal if such a question was apparent on the order itself or it could be raised on the facts found by the Tribunal and which were stated in the order. I see no reason to confine the jurisdiction of this Court to such questions of law as have been argued before the Tribunal or are dealt with by the Tribunal. The section does not say so and there is no reason why we should construe the expression "arising out of such order" in a manner unwarranted by the ordinary grammatical construction of that

expression. This Court has no jurisdiction to decide questions which have not been referred by the Tribunal. If the Tribunal does not refer a question of law under S. 66 (1) which arises out of the order, then the only jurisdiction of the Court is to require the Tribunal to refer the same under S. 66 (2). It is true that the Court has jurisdiction to resettle questions of law so as to bring out the real issue between the parties, but it is not open to the Court to raise new questions which have not been referred to it by the Tribunal.

[2] The Advocate-General has strongly relied on two decisions, one of the Madras High Court and the other of the Lahore High Court, in support of his contention that inasmuch as although this particular question with regard to S. 4 (1) (b) was raised in the grounds of appeal but was not dealt with by the Tribunal, the Tribunal was wrong in referring it to the High Court. The first decision is of the Lahore High Court (*Jamna Dhar Potdar v. Commr. of Income-tax*, (1935) 3 I. T. R. 112 : (A. I. R. (22) 1935 Lah. 201).) That was a case under the old Act and an application was made under S. 66 (2) asking the Commissioner of Income-tax to state a case on certain points. With regard to the second question the Lahore High Court took the view that although a question of law might be involved, as the question was not raised in the appeal to the Assistant Commissioner, the question did not arise out of the order under S. 31 of the Act and the petitioner had no right to demand that the Commissioner should refer that question. The Madras High Court dealt with the question under the present Act in *A. Abboy Chetty & Co. v. Commr. of Income-tax, Madras*, (1947) 15 I. T. R. 442 : (A. I. R. (35) 1948 Mad. 181) and took the view that a question of law can be said to arise out of an order of the Appellate Tribunal only if such order discloses that the question was raised before the Tribunal. It will be noticed that what this means is that not only the question should be raised before the Tribunal but also that the order itself should disclose that the question was so raised. With great respect if the view taken by the Madras High Court were right, it would amount to this that if an assessee appearing in person or an assessee who was wrongly advised did not think fit to raise a question of law or argue it before the Tribunal, then although such a point of law was apparent on the face of the order or arose on the facts already found by the Tribunal, the assessee would be debarred from raising that question before the Court. The decision of the Madras High Court would also result in this extraordinary situation. An assessee may raise a question and argue it before the

Tribunal, but if the Tribunal thought fit to ignore that argument and not to refer to that point of law in its order, then the Court would have no jurisdiction to call upon the Tribunal to refer that question of law to the High Court. It is true that the Income-tax Act is a very technical statute, but I see no reason why when the plain grammatical construction of the section does not make it necessary to come to that conclusion it is necessary to do so and arrive at such an anomalous result. It is not as if it would be open to one party or the other to raise any question before this Court merely because such a question arose out of the order of the Tribunal. The proper safeguard is that this Court cannot advise on any question unless it has been referred to it by the Tribunal or unless we require the Tribunal to state a question of law for our consideration. A similar attempt was made to restrict the jurisdiction of this Court under the old Act and it was repelled by this Court, and the case is reported in *Vadilal Lallubhai v. The Commissioner of Income-tax*, 37 Bom. L. R. 89 : (A. I. R. (22) 1935 Bom. 170). Under the old Act it was for the Commissioner of Income-tax to formulate the questions of law arising out of the order made by the Assistant Commissioner, and in the case which came before Beaumont C. J. and Rangnekar J. the Commissioner refused to state a case taking the view that the question of law as formulated by the assessee did not arise out of the order, and, therefore, no question arose of stating the case. The assessee then made an application under S. 66 (3) asking this Court to require the Commissioner to state the case. It was then argued that this Court had no jurisdiction to direct the Commissioner to state the case arising on a question of law not formulated before him. Various decisions of other High Courts were cited in support of that view. Beaumont C. J., in delivering the judgment, refused to agree with the views of the other High Courts on this point, and he expressly disagreed from the view of the Full Bench of the Rangoon High Court, taking the view that their view seemed to restrict the powers of the High Court in a manner not authorised by the Act. In my opinion the present attempt of the Advocate-General is also to restrict the powers of the High Court in a manner not authorised by the Act; and to confine the questions of law arising out of the order merely to those questions of law which have been raised before the Tribunal or dealt with by the Tribunal is, in my opinion, restricting unauthorisedly the advisory jurisdiction of this Court. Kania J. had to consider a similar question in *New piecegoods Bazar Co., Ltd. v. Commr. of Income-tax*, 49 Bom. L. R. 620 : (A. I. R.

(35) 1948 Bom. 72 (2) (F.B.)). The question before the Court (Stone C. J. and Kania J.) was whether certain deductions were permissible in respect of the assessee's income from property. Now in the assessee's appeal to the Appellate Tribunal one of the grounds taken was that on the proper construction of S. 9 the amount paid for the municipal taxes and urban immovable property tax should be allowed as a deduction in computing the income from property. Kania J. pointed out that that contention could cover two grounds: one, that the taxes should be deducted in the first instance before arriving at the *bona fide* annual value within the meaning of S. 9, and the other, that the annual value of the property being ascertained those were permissible deductions under heads (iv) and (v) of sub-s. (1). The Commissioner argued that the first aspect was never contemplated or urged by the assessee and was, therefore, not dealt with. Kania J. stated in his judgment that there appeared force in that contention although he took the view that the assessee was in a position to raise that contention by the ground of appeal formulated by him. Therefore, Kania J. took the view that, although the contention was put forward as a ground of appeal, it had not been dealt with by the Tribunal. If the Advocate-General were right, this Court had no jurisdiction to consider that contention at all. But what the Court there did was to send the reference back to the Tribunal and invited it to express its opinion on that aspect of the contention and raise a proper question of law on that point.

[3] I may point out that in the case before us the position is more simplified because although the point was not dealt with by the Tribunal the Tribunal has actually raised a question of law and has referred it to us for our opinion. Under S. 66 (5) we have to decide the questions of law raised and submitted to us. I do not see how it is open to the Advocate-General once a question of law has been raised by the Tribunal to ask us not to give our opinion on it in view of S. 66 (5). It may be that a particular question may be irrelevant or unnecessary, and we may refuse to give our opinion on such a question, but I do not think that it is competent to a party to challenge the jurisdiction of this Court to answer a question which has been raised by the Tribunal. The Tribunal wants our advice on a particular question of law and it is our statutory duty to give that advice to the Tribunal.

[4] Now coming to the questions themselves, with regard to the first question Mr. Kolah's contention is that under S. 4 (1) (b) (ii) only such remittances are taxable which represent

income which was earned by a resident in British India. According to him if a resident in British India earns income outside British India and then brings that income into British India, the income having been earned after 1st April 1938, such a remittance into British India is taxable under S. 4 (1) (b), sub-cl. (iii). Mr. Kolah contends that inasmuch as this particular income of Rs. 2,01,000 was earned by the assessee as a non-resident outside British India, it cannot be taxed at all. Mr. Kolah, therefore, asks us to give the word "him" occurring in that sub-clause a particular connotation. He wants us to read that word to mean "provided that he was a resident in British India." I see no reason why these words should be interpolated in S. 4 (1) (b) (iii). It is also important to note that S. 4 (1) (b) (ii) deals with income of a resident in British India which accrues or arises without British India. Therefore, in any particular year the total income of a resident in India would also include all income which accrued or arose to him without British India. As that was already taxed if he brought that income into British India subsequently, it could not possibly be taxed again and, therefore, if Mr. Kolah's contention was right it was unnecessary and superfluous to enact sub-cl. (iii) at all. Sub-clause (iii) is enacted, amongst other things, to deal with this particular case which we have before us which would not have fallen under sub-cl. (ii). It is a case of a non-resident receiving income, then coming to British India and becoming a resident here and bringing his income into British India, and as this income was not taxed before, it becomes liable to tax as remittance in the year in which it is brought into British India. It is necessary to note that under this sub-clause what is being taxed is not income but remittances and the Legislature is only concerned with the fact that the person who remits it is a resident in British India and that the remittance takes place in the year of accounting. The fact that the remittance represents income earned by a non-resident is entirely irrelevant.

[5] With regard to the second question, namely, whether the assessee is entitled to set off Rs. 73,779 against the sum of Rs. 2,01,000 it is conceded by Mr. Kolah that he can only succeed if he can satisfy us that both these amounts fell under the same head of income, because otherwise the proviso to S. 24 would clearly come in his way. Now it is true that Rs. 73,779 is a loss in business of the assessee carried on in Indore and the question is whether the amount of Rs. 2,01,000 can be considered to be falling under the head of profits and gains of the assessee's business. Mr. Kolah says that this amount

was earned in his business, but we are not concerned with how this income arose to the assessee. The relevant point of time is when this amount was brought into India. It is the remittance that has to be taxed and it is clear that this remittance cannot fall under S. 10 as income from business but it must fall under S. 12 as income from other sources. If that be so, then it is clear that the assessee cannot set off Rs. 73,779 which is a loss falling under the head business against Rs. 2,01,000 which is income falling under the head "other sources" under S. 12. I would, therefore, answer the first question in the affirmative, and the second question in the negative. The assessee must pay the costs of this reference.

[6] **Tendolkar J.**—This reference arises out of an assessment for the year 1944-45 the accounting year being S. 1999-2000 (Maru) beginning from 9th November 1942. The assessee was a resident during that year but was held to be a non-resident in preceding years. Upon the commencement of his business in Bombay on 9th November 1942, a sum of Rs. 51,000 was credited in the personal account of the assessee. Another sum of Rs. 1,50,000 was similarly credited on 8th January 1943. These two sums aggregate to Rs. 2,01,000; and it was the case of the assessee before the Income-tax Officer that his rich uncle had died leaving him a large fortune and this amount represented a part of that fortune brought by him into British India. On this he was disbelieved, and it was held that these sums represented remittance of profits received in British India by the assessee through business carried on in previous years in the Indore State. They were, therefore, assessed under S. 4 (1) (b) (iii), and the first question of law that has been referred to us is whether they were so rightly assessed. During the accounting year the assessee suffered a loss in his business at Indore to the extent of Rs. 73,779. The assessee claims that he is entitled to set off this amount against the remittance of Rs. 2,01,000, and the second question referred to us is whether he is so entitled.

[7] Upon this reference having been called on before us, the Advocate-General for the Commissioner raised a preliminary objection that the first question of law was wrongly referred to us by the Tribunal inasmuch as it does not arise out of the order of the Tribunal, and that, therefore, we should not determine it. To this preliminary objection there is to my mind a very short answer for the purposes of this reference. The scheme of S. 66, Income-tax Act, is that under sub-s. (1) either the assessee or the Commissioner may apply to the Tribunal to refer to the High Court any question of law arising out of such order and the Tribunal may draw up a

statement of the case and refer it to the High Court. If they do so, and they have done so in the present reference, then it is the duty of the High Court under sub-s. (5) thereof to decide the question of law raised by the case stated. The section does not confer power either on the assessee or the Commissioner to go to Court and urge that the case should not have been stated or no question of law should have been raised. It is only if the Tribunal takes the view that no question of law arises and refuses to state a case that either party is entitled to apply to Court under sub-s. (2) for an order requiring the Tribunal to state a case. That is not the position before us. Since the Tribunal has, although the question was not argued before it, raised the question of law and referred it to us, we are bound to determine it under sub-s. (5). In this view of the case I do not consider it necessary to express any opinion on the wider question as to the correct meaning placed on the words "question of law arising out of such order." There has been a wide divergence of judicial opinion on the interpretation of these words and the various High Courts have taken various views which are difficult to reconcile. These words would, in my opinion, fall to be determined only when an application under S. 66 (2) is made requiring the Tribunal to state a case. I, therefore, refrain from expressing any opinion on the correct interpretation to be placed on these words.

[8] With regard to the first question of law that has been referred to us, the language of S. 4 (1) (b) (iii) is plain and simple. It provides that the total income of an assessee, resident in British India, shall include income, profits and gains which have accrued or arisen to him without British India before the beginning of the accounting year and after 1st April 1933, and are brought into or received in British India during the accounting year. There is no doubt that in this case, on the facts found, Rs. 2,01,000 represented income, profits or gains which accrued to the assessee without British India prior to the accounting year and after 1st April 1933, and, therefore, in terms the sub-clause applies. But it is contended by Mr. Kolah for the assessee that this sub-clause does not relate to the income which accrued or arose to a person who was a non-resident at the time when the income accrued or arose. To my mind, there is no justification for restricting the meaning of the sub-clause in this manner. It would amount to interpolating into the plain words of this sub-clause words which are not there. Moreover, if such was the true intention of the Legislature, it is difficult to understand why sub-cl. (ii) and (iii) should have existed side by side in respect of any year subsequent to the year when these sub-clauses

were inserted in the Income-tax Act by the amendment of 1939. Income which accrues or arises to a resident in British India during any year is a part of his total income under S. 4 (1) (b) (ii). It could not have been intended that this particular part of the total income should again be included in his total income in a subsequent year when it is received in British India. I am, therefore, not prepared to restrict S. 4 (1) (b) (iii) in the manner suggested by Mr. Kolah, and I agree that the first question must be answered in the affirmative.

[9] With regard to the second question, Mr. Kolah claims that he is entitled to set off the loss of Rs. 73,779 against the amount of Rs. 2,01,000, because he says that the amount of Rs. 2,01,000 is profits and gains of a business within the meaning of S. 10, and, therefore, the loss made in that business must be set off against that sum. I cannot agree that this amount represents profits of a business or that it has been taxed as such. This amount is included in the total income of the assessee by reason of the fact that it was remitted to British India during the accounting year and, therefore, it has been quite rightly taxed by the Income-tax Officer under the head "Income from other sources." The amount of Rs. 73,779 which represents business loss cannot, therefore, be set off against it under S. 10 of the Act. Reliance was next placed on S. 24 of the Act. No doubt under that section where an assessee sustains loss of profits or gains in any year under any of the heads mentioned in S. 6 he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year. Now the sum of Rs. 2,01,000 falls within the fifth head in S. 6, viz. "Any other sources," and the loss of business falls under a different head, viz., the fourth head of "Profits or gains of business." So that S. 24 (1) applies. But the proviso to that section puts the assessee out of Court. That proviso provides that in so far as the loss sustained is a loss incurred in a native State, such loss shall not be set off against profits or gains in British India, but can only be set off against profits and gains in an Indian State. The result, therefore, is that even under S. 24 the assessee is not entitled to have the amount of Rs. 73,779 set off against the sum of Rs. 2,01,000. The second question referred to us must, therefore, be answered in the negative.

D.H.

Answers accordingly.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

* **A. I. R. (36) 1949 Bombay 29 [C. N. 6.]**

CHAGLA C. J. AND BHAGWATI J.

Krishnaji Vithal Kangutkar—Accused—Applicant v. Emperor.

Criminal Revn. Appln. No. 21 of 1948, Decided on 13th February 1948, from order of Weston J., in Sessions Case No. 2 of 1947.

* (a) Criminal P. C. (1898), S. 435—Inferior criminal Court—High Court in Sessions is inferior to High Court on appellate side—Revision lies from order of High Court in Sessions.

'Inferior' does not carry with it any stigma or any suggestion that the Court is under the administrative orders of the Superior Court. Inferior criminal Court only means judicially inferior to the High Court.

[Para 4]

A Court is inferior to another Court when an appeal lies from the former to the latter: 10 Cal. 268, *Rel. on.*

[Para 4]

The High Court in Sessions, exercising original criminal jurisdiction, is inferior to the High Court on its appellate side, as appeal lies from the former to the latter. Hence an application in revision lies from an order made by a Judge presiding over the Sessions in the High Court.

[Para 5]

Annotation: ('46-Com.) Criminal P. C., S. 435, N. 8.

(b) Penal Code (1860), S. 286—"Explosive substance"—Firing loaded gun may come under S. 286.

Where the accused fired a loaded gun in a narrow passage in a small building:

Held that S. 286 applied to the case. It was not the using of the gun as such which was the gravamen of the charge and the explosive substance was the cartridge used in the gun. The firing of a gun which did not contain a cartridge would not have come under the section: 1 Weir 235, *Dissent.*

[Paras 7, 8, 9]

M. P. Amin, S. A. Desai, T. G. Lobo and S. A. Kher—for Applicant.*S. G. Patwardhan, Government Pleader*—for the Crown.**Chagla C. J.**—This is an application in revision by the accused who was tried with a jury by Weston J. on the Original Criminal Side of this Court. The accused was charged under S. 307, Penal Code, in that he attempted to commit murder of his father and brother by firing a gun at them. The jury brought in a verdict of not guilty under S. 307, and the learned Judge acquitted and discharged the accused under that section. But the jury brought in a unanimous verdict of guilty under S. 286, Penal Code. The learned Judge convicted him under that section, and sentenced him to six months' rigorous imprisonment. It is from this conviction and sentence that this revisional application has been preferred.

[2] The Government Pleader, in the first instance, contends that no criminal revision lies from an order of conviction and sentence passed by the High Court in Sessions. Now, it is to be borne in mind that, till the Criminal Procedure Code was recently amended, no appeal lay from a conviction on a trial held by a High Court in the exercise of its original criminal jurisdiction. It was only under Act 26 [XXVI] of 1943 that

the right of appeal was given to a convicted person to appeal to the High Court from a conviction and sentence in a trial held by the High Court.

[3] The revisional powers of the High Court are exercisable in relation to criminal Courts inferior to the High Court, and the Government Pleader has argued that the High Court, when it is exercising its original criminal jurisdiction, is not a Court subordinate to the High Court on its appellate side. The Government Pleader says that both the Courts are the High Courts; they are only different divisions of the High Court, and it would be wrong to say that one division of the High Court is an inferior criminal Court to another. The Government Pleader relies on S. 6, Criminal P. C., which defines the different classes of criminal Courts, and that section provides that besides the High Courts there are five classes of criminal Courts, and therefore that section contemplates that the High Court itself is a criminal Court like the other Courts which are enumerated in that section.

[4] Now, it is perfectly true that the High Court acting in its original criminal jurisdiction is not a Court subordinate to the appellate side of the High Court. But the expression used in S. 435 is not 'subordinate', but 'inferior'. 'Inferior' does not carry with it any stigma or any suggestion that the Court is under the administrative orders of the superior Court. In our opinion, inferior criminal Court only means judicially inferior to the High Court. Now, if one turns to S. 6, the first class of criminal Courts are Courts of Session, and Courts of Session are undoubtedly judicially inferior to the High Court. The result of amendment by Act XXVI of 1943 is really to put the High Court acting in its original criminal jurisdiction practically in the same category as the Court of Session, or, perhaps a different criminal Court was constituted, which was the High Court acting in its original criminal jurisdiction, and an appeal was permitted from that Court to the High Court, just as appeals are permitted from the different Courts enumerated in S. 6, Criminal P. C. A Court is inferior to another Court, when an appeal lies from the former to the latter, and same is the view taken of this expression by the Calcutta High Court in *Nobin Krishto Mookerjee v. Russick Lall*, 10 Cal. 268, where the Bench consisting of McDonell and Field JJ. held that "inferior Criminal Court" must be construed to mean "judicially inferior" that is, a Court over which the Court or Magistrate proceeding under S. 435 of the Code has appellate jurisdiction.

[5] We, therefore, hold that an application in revision lies from an order made by a Judge

presiding over the Sessions in the High Court. In this case no appeal could be preferred, because under S. 413 of the Code no appeal lies in cases where the High Court passes a sentence of imprisonment not exceeding six months or a fine not exceeding two hundred rupees only.

[6] The objection taken by Mr. Amin to the conviction is that the learned Judge was wrong in directing the jury to bring in a verdict under S. 286 without framing a proper charge. Now, what happened was this. The learned Judge at the end of the trial asked counsel for the defence to consider whether, assuming the accused was not guilty of attempt to murder inasmuch as he did not deliberately fire the gun at his father and brother, and merely fired the gun in order to frighten them, he would not be guilty under S. 286, Penal Code. Apparently, therefore, the learned counsel for the accused was asked to address the jury on that aspect of the case. Then, in his summing up the learned Judge put before the jury very fairly the two alternatives. The learned Judge pointed out that, in the first instance the jury had to be satisfied that it was the accused who fired the gun; then the jury had to consider whether the gun was fired deliberately at his brother and his father; if they came to that conclusion, then the accused would be guilty under S. 307. If, on the other hand, the jury took the view that, although the accused fired the gun, he did not fire deliberately in order to kill his father and brother, then the jury must consider the other aspect of the case. He drew the attention of the jury that the gun was fired in a narrow passage of a small building with rooms on both sides of which the doors were possibly open, and he asked the jury to consider whether a man firing a gun in a place like that would be considered to be doing a rash and negligent act likely to endanger life, and if they took that view, then they should bring in a verdict under S. 286. The jury having considered the learned Judge's summing up as we have pointed out, acquitted the accused under S. 307, and brought in a verdict of guilty under S. 286. In other words, the jury took the view that the accused did fire the gun, but that he did not fire deliberately, but he fired under such circumstances that it constituted a rash and negligent act.

[7] Now Mr. Amin says that, if a charge had been framed, the cross-examination of the prosecution witnesses would have been directed to that point, and the whole aspect of the defence would have been different. Now, as we have pointed out, the defence of the accused was that he did not fire the gun at all. The place where the gun was fired was before the jury, and evidence was led as to the nature of the place. A

plan was put in, and the whole question was whether if the accused had fired the gun he had fired it under the circumstances which would be considered rash and negligent, there being no doubt as to the place where the gun had been fired. It is difficult to see how it is possible to contend, if the accused did fire the gun, and he fired the gun in that particular spot, it could be anything but a rash and negligent act. We can understand the defence which was taken—that the accused did not fire the gun. We can understand the defence that it was not fired deliberately to kill either the father or the brother. But we cannot see how a defence which is now suggested could ever have been contemplated that, although he fired a gun in a narrow passage in a small building, his doing that act did not amount to a rash and negligent act. Perhaps, it would have been better if the learned Judge had framed an alternative charge before he left the matter to the jury; but, in our opinion, the non-framing of the charge has not led to any prejudice as far as the accused is concerned, and has certainly not led to the miscarriage of justice.

[8] We might advert to one other point that has been urged by Mr. Amin. According to him, if you fire a gun, you are not using an explosive substance, because apparently a gun does not explode, but nobody suggests that it is the using of the gun as such which constitutes the gravamen of the charge. The explosive substance is the cartridge used in the gun which explodes, and the charge is that the accused used a cartridge, being an explosive substance by putting it in the gun and firing it, thereby constituting a rash and negligent act. If he had fired a gun which was not loaded and which did not contain any cartridge, undoubtedly S. 286 would not apply.

[9] Our attention has been drawn to a case in *Kasiya Pillai*, 1 Weir 235 where the Madras High Court took the view that if a man fired a loaded gun that would not attract the application of S. 286. With very great respect, we are unable to agree with that decision, the more so as no reason is given why using a loaded gun does not amount to the using of an explosive substance.

[10] Finally, Mr. Amin has urged upon us the question of sentence. Under S. 286 the maximum sentence that the learned Judge could have awarded was six months' rigorous imprisonment and he has awarded that sentence. Yet we feel that the jury has really taken a very lenient view of the case, and have chosen to bring in a verdict under S. 286 rather than under S. 307. Considering the fact that the weapon was used in a narrow passage in a small building where people were living in rooms on either side of the

passage, considering the fact that he did this to frighten his brother and father, because there was some litigation between them and their relations were strained, we do not think that any case is made out why we should interfere with the sentence passed by the learned Judge.

[11] The result is that the application must fail. Rule is discharged.

V.B.B.

Rule discharged.

A. I. R. (36) 1949 Bombay 31 [C. N. 7.]

CHAGLA C. J. AND TENDOLKAR J.

Maria M. E. L. Noronha — Appellant v. Peter E. V. Noronha—Respondent.

O. C. J. Appeal No. 3 of 1948, Decided on 30th March 1948.

Civil P. C. (1908), S. 35—Divorce cases—Petition by wife — Failure of petition — Costs are in discretion of Court — Duty of solicitors — Solicitors must scrutinize charges levelled against husband carefully — Divorce Act (1869), S. 55.

Even in petitions for divorce by the wives, it is now well established that the costs are in the absolute discretion of the Judge, and that in determining whether the wife should get her costs or not he must consider each case on its own merits. It is perfectly well established now, that the misconduct of the solicitor is not the only ground on which the wife can be deprived of her costs. If her petition is groundless, or if she has made wild charges against her husband, the Court may take that into consideration, and while acquitting the solicitor from misconduct, refuse her costs, and may even mulct her in costs. (1922) 28 L. T. 26 and (1926) 42 T. L. R. 619, *Ref.* [Para 2]

There is and there must be a very serious responsibility on the solicitors to whom a wife goes for filing a petition for divorce against her husband. When she is a defendant and she wants to defend herself, the position is perhaps different, but when she is the attacking party, it is incumbent upon the solicitors to carefully scrutinise the charges that she wants to level against her husband and to make up their mind whether there are reasonable grounds for proceeding against her husband. If they fail to scrutinise the charges, or if they come to a conclusion which is not reasonable as to whether a petition should be launched or not, the solicitors take the risk of not being given their costs. [Para 3]

It is not sufficient merely to obtain an opinion from counsel to launch a matrimonial litigation. The duty is upon the solicitors themselves to scrutinise the petitioner's case, and they cannot discharge that duty by throwing the burden upon counsel. It is for them to decide, having scrutinised the materials before them, and if so advised having obtained counsel's opinion, and having considered the same; but the ultimate responsibility must be theirs and they must satisfy themselves and take every possible care to see that there was reasonable ground for proceeding with the wife's petition. [Para 4]

[*Held* that in the circumstances of the case; the wife's solicitors might have been more careful and vigilant before they advised the petitioner to launch the litigation.] [Para 4]

Annotation:—(“44-Com) Civil P. C. S. 35 N. 13.

K. L. Gauba and S. D. Vimadala — for Appellant.
P. P. Khambatta and Jal H. Vakil — for Respondent.

[NOTE : The appellant filed a petition for dissolution of her marriage with her husband on the ground of cruelty, desertion and adultery on the part of her husband. Coyajee. J, who heard the petition dismissed it on merits holding that the charges were baseless. The learned Judge also deprived the wife of her costs on that ground. The petitioner appealed. After discussing the evidence in the case Chagla C. J. held that the lower Court was right in coming to the conclusion that the charges contained in the petition were not proved. On the question of costs, his Lordship said as follows:]

Chagla C. J.—* * * But the real point which Mr. Gauba has urged, and I suspect which is the real reason why this appeal has been filed at all, is found in the submission that the learned Judge was wrong in depriving the wife of her costs although she failed in her petition. Now Mr. Gauba says that the principle of law is that if a wife files a petition for dissolution of her marriage, if she has no property of her own and if no misconduct is proved against her solicitors in launching that litigation, then she is entitled to her costs. Mr. Gauba says that as in this case the learned Judge has not found that there was any misconduct on the part of the solicitors and it is common ground that the petitioner has no property of her own, she must be given her costs although she has failed in the petition. In this case I might mention that an order was made against the husband to deposit certain amount as security for the wife's costs. Now the English practice as to a wife's costs in a divorce action has a historical background. At a time when a woman could not own any property, and when on her marriage whatever property she had vested in her husband, a rule of practice was devised in order not to make it impossible for the wife ever to fight a litigation against her errant husband. It was obvious that the wife had no money and no property and she would not be able to induce any solicitor to take up her case which she wanted to place before the Court unless the solicitor felt an absolute certainty as to the result of the litigation and no solicitor can ever feel that certainty. But the rigour of that rule has been considerably relaxed after the archaic system of law with regard to women's property was abrogated in England. Now that a woman can own property and now that she can earn and compete with a man on equal terms the rule has to a large extent lost its logical basis. We find the old rule of practice enunciated in the leading case of *Robertson v. Robertson*, (1881) 6 P. D. 119. It was enunciated by Brett L. J. as being that a wife was ordinarily entitled to her costs unless it was established that,

"the solicitor who appears for the wife either knowingly prompted a case which it must be clear to anybody had no foundation at all, so that he had been countenancing improper litigation; or if he took steps which were merely oppressive or obviously unnecessary; or if he crowded the case with absurd evidence."

then the costs of the wife should be disallowed either in whole or in part. Cotton L. J. says this (p. 125) :

"When the wife has to take proceedings against her husband, or he against her—all her property being [vested] in him — she ought to be provided at his expense with the means of bringing her case before the Court or of properly defending the case brought against her; and whether she is successful or not, in my opinion, the rule is to this effect, that costs properly incurred in bringing her suit before the Court, or in defending the attack made on her, ought to be paid by her husband."

[2] That was in 1881 and since then in case after case the English Matrimonial Courts have relaxed, as I was saying, the rigour of that rule. It is now well established that the costs are in the absolute discretion of the Judge, and that in determining whether the wife should get her costs or not he must consider each case on its own merits. It is perfectly well-established now, that the misconduct of the solicitor is not the only ground on which the wife can be deprived of her costs. If her petition is groundless, or if she has made wild charges against her husband, the Court may take that into consideration, and while acquitting the solicitor from misconduct, refuse her costs, and may even mulct her in costs. In *Usher v. Usher*, (1922) 128 L. T. 26, Salter J., refused to give the wife her costs though intending no reflection on the wife's solicitors. In *Baldwin Raper v. Baldwin Raper and Metz*, (1926) 42 T.L.R. 619, Hill J. refused to give a wife her costs on the ground that "her suit was based on shameful charges which were the inventions of a vile mind," and observed that if she could be made to pay the costs of it, she ought to be made to pay. The learned Judge then asked himself a question whether there was anything to prevent him from exercising his discretion and he came to the conclusion that there was no reason why he should not exercise that discretion except perhaps the question of costs of the wife's solicitor. The learned Judge finally came to the conclusion that the wife's solicitor had no higher or better right than the wife herself.

[3] I may point out that there is and there must be a very serious responsibility on the solicitors to whom a wife goes for filing a petition for divorce against her husband. When she is a defendant and she wants to defend herself, the position is perhaps different, but when she is the attacking party, it is incumbent upon the solicitors to carefully scrutinise the charges that she wants to level against her husband and to make

up their mind whether there are reasonable grounds for proceeding against her husband. If they fail to scrutinise the charges, or if they come to a conclusion which is not reasonable as to whether a petition should be launched or not, the solicitors take the risk of not being given their costs.

[4] Now, in this case, I should straightway like to state that the solicitors of the wife are not guilty of fomenting this litigation. But I am not at all satisfied on the record of this case that the solicitors scrutinised the case of the wife with that care which it was their duty to do. We have on the record of this case instructions given to counsel to advise and draft petition for dissolution of marriage. On the question of adultery statements were submitted of only Ring, Kuddoos and Sequeira who could speak to the alleged incident of the adultery. Now it should have been patent to the solicitors that it would be very difficult indeed to establish a charge of adultery on the testimony of these three witnesses. Ring's reputation is notorious in this Court, and for the solicitors to expect that they would bring home to the respondent the charge of adultery on the mere testimony of this detective backed by his own henchmen was taking much too optimistic a view of the wife's case. With regard to cruelty in this case unlike most cases for divorce a very large volume of evidence was available which could have been carefully considered by the solicitors. It seems that there were custody proceedings in the Bangalore Court between the husband and the wife. In those proceedings the letters to which I have already made reference, written by the wife, were exhibited and therefore presumably those letters were before the solicitors. These letters would show that the wife's case that she was forced by her husband to undertake abortions one after the other seems to be patently false. The respondent was also charged in the petition with drinking, gambling and womanising. No attempt was made to prove against him any case of womanising or being drunk, and with regard to gambling the petitioner had to content herself with a solitary instance where the husband in a fit of optimism invested a large amount on a horse which failed to turn up at the winning post. It is true that in this case instructions were sent to counsel and counsel advised the solicitors to launch the litigation. I do not think that a solicitor can discharge his duty by taking shelter behind counsel. It is not sufficient merely to obtain an opinion from counsel to launch a matrimonial litigation. The duty is upon the solicitors themselves to scrutinise the petitioner's case, and they cannot discharge that duty by throwing the burden upon

counsel. It is for them to decide, having scrutinised the materials before them, and if so advised having obtained counsel's opinion, and having considered the same; but the ultimate responsibility must be theirs and they must satisfy themselves and take every possible care to see that there was reasonable ground for proceeding with the wife's petition. I am conscious of the criticism that a severe rule as to costs may prevent a wife from fighting her husband in a fit case, but I am equally conscious that husbands who have very little money and who are with difficulty maintaining themselves should not be compelled to fight false cases prompted by their wives, and not only fight those cases but ultimately even if they succeed pay costs of the wife who had no justification whatever for launching the litigation. In this case Coyajee J.'s finding is that the wife's case was a tissue of inventions. It is on that ground that the learned Judge has deprived the wife of her costs. In my opinion also there is this criticism to be offered against the wife's solicitors that they might have been more careful and vigilant before they advised the petitioner to launch this litigation in which she was inevitably bound to fail. In my opinion, therefore, the learned Judge was right in coming to the conclusion that he did that on the merits of the petitioner's case, and he was also right in coming to the conclusion in making no order as to the costs of the petition.

[5] The result, therefore, is that the appeal fails and is dismissed. No order as to costs of the appeal.

[6] Liberty to the respondent's attorneys to withdraw Rs. 1800 deposited for the wife's costs.

V.B.B.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 33 [C. N. 8.]

JAHAGIRDAR J.

Chima Savalaram Lande — Applicant v. Babulal Ravchand and others — Opponents.

Civil Revn. Appln. No. 450 of 1947, Decided on 27th February 1948, from order of Civil Judge (Junior Division), Murbad, in Suit No. 28 of 1945.

Bombay Agricultural Debtors Relief Act (XXVIII [28] of 1947), S. 19 (1) — Scope of S. 19 is not controlled by S. 4 — Transaction of 1915 — Debtor can apply for transfer under S. 19 (1).

Under the old Act of 1939, no application for transfer of suits etc. could be made with regard to transactions before 1st January 1927. Section 19 (1) of the present Act is enacted for the purpose of conferring the benefit of the provisions of the Act on the debtors even with regard to this class of suits. The scope of the new Act is not confined to disposals of applications directly made under S. 4. Hence, where the transaction is of 1915, provided the debtor satisfies the other conditions, he is entitled to the privileges conferred upon him under the Act. He can thus apply under S. 19 for transfer of suit pending in respect of that transaction to the Court established under the Act. [Paras 3, 4, 5]

1949 B/5 & 6

G. S. Gupte — for Applicant.

K. J. Abhyankar — for Opponents Nos. 1 to 6.

Order. — This application has been filed by the original plaintiff against an order of the Civil Judge, Junior Division, at Murbad, in the Thana District, declining to transfer the suit to the Court under the Bombay Agricultural Debtors Relief Act, 1947. The facts are that in 1945 the plaintiff filed suit No. 28 of 1945 in the Court of the Civil Judge, Junior Division, at Murbad, for a declaration that the transaction of 28th August 1915, purporting to be a sale, was in fact a mortgage and for accounts. At the time when he filed this suit, a Debt Adjustment Board had been established for that taluka as far back as 1942. But by virtue of S. 45, Bombay Agricultural Debtors Relief Act, 1939, he could not have made an application to the Debt Adjustment Board at that time as the transaction was of the year 1915. On 27th May 1947, the Bombay Agricultural Debtors Relief Act of 1947 came into force. Thereupon, on 13th June 1947, the plaintiff prayed that the suit might be transferred to the Court established under the Bombay Agricultural Debtors Relief Act. The trial Court held that the suit could not be transferred. As against this order the plaintiff has come in revision.

[2] In support of his application Mr. Gupte, the learned advocate for the plaintiff-applicant, contends that S. 19 (1) of the Act of 1947 confers wider powers on the Court than the corresponding S. 37 (1) of the repealed Act. Section 37 of the old Act was subject to S. 45 of the same Act, which provided that nothing in that section shall apply to any transactions entered into before 1st January 1927. In the new Act there is no provision corresponding to S. 45 (2) of the old Act. The learned Judge, however, did not accept this contention. According to him, the suits or proceedings to be transferred under sub-s. (1) of S. 19 must satisfy the requirements of S. 4. I am afraid the learned Judge has entirely misread the two sections.

[3] Section 4 deals with the applications that can be directly made to the Court. Its scope is very limited. It applies to debtors and creditors living in an area where the Board was established after 1st February 1947. The scope of the Bombay Agricultural Debtors Relief Act, 1947, is not confined to disposals of applications directly made under S. 4. The proviso to S. 56 (2) states that all proceedings pending before the Boards established under S. 4 of the repealed Act shall be continued before the Court as if an application under S. 4 of the new Act has been made to the Court. Similarly, S. 19 (1) further widens the scope of the proceedings under S. 4. It provides that all suits, appeals, applications for execution, etc., pending in any civil or revenue Court shall,

if they involve the questions whether the person, from whom such debt is due, is a debtor, and whether the total amount of debts due from him on the date of the application exceeds Rs. 15,000, be transferred to the Court. Section 19 (3) further provides that when any such suit, appeal, application or proceedings is transferred to the Court under sub-s. (1) or sub-s. (2), the Court shall proceed as if an application under S. 4 had been made to it. The suits, appeals, etc., referred to in sub-s. (1) must necessarily be with regard to transactions about which no application could have been made under S. 4 of the repealed Act. Under the old Act, no applications could be made with regard to transactions before 1st January 1927. The suits had, therefore, to be filed in the ordinary civil Courts under the Dekkhan Agriculturists Relief Act. Section 19 (1) is enacted for the purpose of conferring the benefit of the provisions of the Act on the debtors even with regard to this class of suits.

[4] This view derives some support from the definition of "debtor" that is to be found in S. 2 (5) of the new Act. According to this definition "an individual who held a land at any time not more than 30 years before 30th January 1940, would be a debtor provided the other conditions mentioned therein are satisfied."

This itself shows that a person, who has apparently sold his agricultural land after 30th January 1910, can take the benefit of the provisions of this Act, and in view of this definition of a debtor, I think that no provision corresponding to S. 45 has been enacted in the new Act. As the transaction in dispute is of 1915, the debtor, provided he satisfies the other conditions, is entitled to the privileges conferred upon him under the Bombay Agricultural Debtors Relief Act.

[5] I, therefore, hold that the trial Court was wrong in holding that S. 19 was controlled by S. 4 and consequently in refusing to transfer the suit to the Court under the Bombay Agricultural Debtors Relief Act.

[6] I, therefore, allow the application, make the rule absolute and direct that the suit be transferred to the Court under the Bombay Agricultural Debtors Relief Act.

[7] The opponents should pay the costs of the applicant.

V.B.B.

Rule made absolute.

A. I. R. (36) 1949 Bombay 34 [C. N. 9.]

CHAGLA C. J. AND TENDOLKAR J.

Tejaji Farasram Kharawalla — Assessee v. Commissioner of Income-tax, Bombay (Mofussil).

Income-tax Ref. No. 9 of 1947, Decided on 23-3-1948.

Income-tax Act (1922), S. 4 (3) (vi)—"Incurred," meaning of—Exemption under S. 4 (3) (vi)—Special allowance — Assessee need not prove that he

actually expended the allowance for the purpose for which it was meant.

Grammatically and taking a strict grammatical view of it, "incurred" may mean actually incurred or to be incurred and the proper meaning would depend upon the context, and "incurred" in S. 4 (3) (vi) does not mean actually incurred by the assessee. The condition that has got to be satisfied before an assessee can claim exemption under S. 4 (3) (vi) is that the grant that should be made to him must be for the purpose specified in that sub-clause. What is emphasised in this sub-clause is the purpose of the grant, the object with which the grant was made. Once it is established that the grant was for the particular purpose, it is no longer necessary for the assessee to prove that in fact he expended that grant for the purpose for which it was given. He may spend more or he may spend less, but *quae* that grant which is given for a particular purpose he is entitled to the exemption. A exemption can therefore be allowed under S. 4 (3) (vi), without it being incumbent upon the assessee to prove that in fact he had expended the whole allowance received by him.

[Paras 3 and 5]

Annotation—('46-Man) Income-tax Act S. 4, N. 24. *Sir Jamshedji Kanga and C. K. Daphtary, Advocate-General*—for Assessee.

G. N. Joshi and R. J. Kolah—for Commissioner of Income-tax.

Chagla C. J.—The assessee in this case is a representative of the Ciba (India), Ltd., and by an agreement entered into between the assessee and Ciba on 29.10.1928, it was agreed that Ciba (India), Ltd., should pay to the assessee 12½ per cent. commission on various articles of Ciba which the assessee was to sell. On 20.8.1935, Ciba (India), Ltd., wrote a letter to the assessee making it clear that out of this commission of 12½ per cent, 7½ per cent. was to be the representative's own commission and 5 per cent. was to be taken by him as compensation in lieu of the contingency expenses he has to meet with, such as commission to dyeing masters, agents, etc. For the account year relevant to the assessment year 1940-41 the assessee received a sum of Rs. 78,573 which represents this 5 per cent. commission. The Income-tax Officer allowed as an admissible item of expenditure only a sum of Rs. 27,342. This sum was allowed because according to the Income-tax Officer the assessee proved that that amount had actually been spent for that particular purpose, viz., the purpose of paying secret commission to dyeing masters and others. This order of the Income-tax Officer was passed on 17th February 1941. On 28th April 1941, the assessee executed five deeds of agreement in favour of five of his salesmen. These agreements went to show that this 5 per cent. commission was given over by the assessee to his salesmen. On the strength of these agreements, the assessee claimed that the entire amount represented by the 5 per cent. commission was actually spent by him and he claimed the whole sum of Rs. 78,573 as a deductible allowance. The Tribunal took the view that these five agreements were

not genuine agreements and discarded them totally. But the two members of the Tribunal, Mr. Malhotra and Diwan Bahadur Gundil differed as to what was the amount that should be permitted to the assessee to be deducted as a permissible deduction. Mr. Malhotra took the view that the assessee should be allowed one-third of the 5 per cent. commission and Diwan Bahadur Gundil took the view that he should be allowed the whole of the 5 per cent. On that the matter went to the President. The President took the view that the assessee's case fell within the ambit of S. 4 (3) (vi) of the Act, but he also took the view that it was incumbent upon the assessee to prove the actual amounts spent by him for the purpose and on that he agreed with Mr. Malhotra that only one-third of the 5 per cent. commission should be allowed to the assessee.

[2] The question that is now referred to us by the Tribunal is whether the assessee's claim to exclude from his income the 5 per cent. commission received by him from the Ciba (India), Ltd., can be allowed under S. 4 (3) (vi) Income-tax Act, without proof by him that the whole commission received by him was spent by him in the performance of his duties as representative of the Ciba (India), Ltd. It is true indeed that implicit in the question itself is the finding of fact that this allowance was granted to the assessee for the purpose of meeting expenses wholly and necessarily incurred in the performance of the duties of his office. Mr. Joshi has attempted to argue before us that it was open to him to contend that on the facts of this case what was paid to the assessee was not a special allowance at all within the meaning of S. 4 (3) (vi). I am afraid that as the record stands, it is not open to the Commissioner to take up that contention. Mr. Joshi has asked us to reformulate the question so as to make the issue clear which arose between the parties. Mr. Joshi is perfectly right that if the commissioner and the assessee were at issue on this question as to whether what was paid to the assessee was an allowance within the meaning of S. 4 (3) (vi), we might have acceded to the request of Mr. Joshi and either reformulated the question or sent the matter back to the Tribunal to raise the proper question and state the necessary facts for that purpose. But we have been satisfied from the record by the Advocate-General that before the Tribunal this issue was never raised. All that was contended was whether in fact the amount was paid or not. If that was the issue between the parties, then undoubtedly the question arose in the form raised by the Tribunal and we, therefore, proceed to consider and answer that specific question.

[3] Now, S. 4 (3) (vi) deals with an income

falling within a class which is exempted from the total income of an assessee under the main sub-clause S. 4 (3). The income that is exempted is an income which must be a special allowance, benefit or perquisite and it must be a special allowance, benefit or perquisite which must have been granted to the assessee for a specific purpose and that purpose must be to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit. The condition that has got to be satisfied before an assessee can claim exemption under this sub-clause is that the grant that should be made to him must be for the purpose specified in that sub-clause. What is emphasised in this sub-clause is the purpose of the grant, the object with which the grant was made. In my opinion, once it is established that the grant was for that particular purpose, it is no longer necessary for the assessee to prove that in fact he expended that grant for the purpose for which it was given. He may spend more or he may spend less, but *quae* that grant which is given for a particular purpose he is entitled to the exemption. What is emphasised before us is the expression "incurred" and it is suggested that that expression conveys the meaning that the amount must have been actually spent before the exemption can be claimed. Grammatically and taking a strict grammatical view of it, "incurred" may mean actually incurred or to be incurred and the proper meaning would depend upon the context, and in this context it is clear that "incurred" does not mean actually incurred by the assessee. In contrast to this provision, one may look at S. 10 (2) (iv) where in order to claim an allowance the expenditure has to be laid out or expended wholly and exclusively for the purpose of the business, profession or vocation of the assessee. In that case the expenditure has to be actually laid out or expended, and before the allowance can be claimed the assessee has got to prove the actual sum which he has expended. Similarly, under S. 12 (2) which corresponds to S. 10 (2) (xv) and is an allowance under the head "other sources" just as S. 10 (2) (xv) is an allowance under the head "business" the expense has got to be actually incurred for the purpose of making or earning the income, profits or gains which fall under that head under S. 12. I am, therefore, of opinion that an exemption can be allowed under S. 4 (3) (vi), without it being incumbent upon the assessee to prove that in fact he had expended the whole allowance received by him. I would, therefore, answer the question submitted to us in the affirmative. The Commissioner to pay the costs.

[4] **Tendolkar J.**— The facts giving rise to this reference have been sufficiently stated in

the judgment delivered by the learned Chief Justice and I shall not restate them. The only question that arises for determination on this reference is what is the correct interpretation to be placed on S. 4 (3) (vi), Income-tax Act. Sub-section (3) of that section provides that certain heads of income shall be excluded from the total income of an assessee. One of such heads is in sub-cl. (vi) which is in these terms :

"Any special allowance, benefit or perquisite specifically granted to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit."

[5] It is contended on behalf of the Income-tax Commissioner that where you have a special allowance granted to meet expenses as set out in this sub-clause, only such portion of that allowance should be excluded from the total income of the assessee as is actually spent by him for the purpose for which the grant was made. This contention ignores the language of the section. The key-word in this sub-clause to my mind is "granted" and not "incurred." The section deals with the purpose for which the grant is made. That purpose must be to meet expenses wholly and necessarily incurred in the performance of the duty. The section does not deal at all with the user to which the allowance is put. Indeed it may be quite open to the person who receives a special allowance, etc., which falls within the meaning of this sub-clause to expend it wholly on some other object of his own. If the contention advanced on behalf of the Income-tax Commissioner was correct, it would require our reading into this sub-clause at the end of the clause some words to the following effect : "to the extent to which it is actually expended for such purpose." That clearly cannot be done, because it is interpolating into the sub-section words which are not there, when the sub-section is quite plain as it stands. Moreover, if it were intended that amounts actually expended wholly and necessarily for the performance of the duties of an office should alone be excluded, in so far as the case of the assessee before us is concerned, it would have been fully covered by S. 10 (2) (xv) and the enactment of S. 4 (3) (vi) would be entirely redundant in the case of any income derived from business. Similarly, if it was the income of a salaried servant, expenses actually incurred would in all cases have been covered by the first proviso to S. 7 and there would again have been no occasion to enact S. 4 (3) (vi) at all. The true interpretation to my mind, therefore, of S. 4 (3) (vi) is that where the object or purpose for which the grant is made is to meet expenses wholly and necessarily incurred in the performance of the duties of an office or employment of profit, the

whole of that grant must be excluded from the total income of the assessee, and the income-tax authorities cannot concern themselves with whether any part of such grant was in fact utilised for the purpose for which the grant was made. The answer to the question will be in the affirmative.

R.G.D.

Answer accordingly.

A. I. R. (36) 1949 Bombay 36 [C. N. 10.]
SEN AND JAHAGIRDAR JJ.

Ranchhoddas Narottamdas v. Emperor.

Criminal Appln. No. 649 of 1947, Decided on 11th February 1948.

Criminal P. C. (1898), S. 488—Married daughter has a right of maintenance.

The right to maintenance under S. 488 is a distinct statutory right irrespective of the personal law of the parties. A legally enforceable right to maintenance at the hands of a third person cannot mean the same thing as ability to maintain oneself.

Consequently a daughter aged 15 years, does not ipso facto lose her right to maintenance under S. 488, upon her marriage. The real and only test is whether that child is unable to maintain herself. It may be that her husband himself is a child or too poor to maintain her in which case she would be entitled to maintenance : A. I. R. (4) 1917 Mad. 276, *Dissent.*; A. I. R. (22) 1935 Cal. 488 and A. I. R. (12) 1925 Mad. 491, *Ref.* [Para 2]

Annotation—('46-Com.) Criminal P. C., S. 488, N. 10, Pt. 12.

Miss S. V. Navalkar—for Applicant (Opponent).

P. G. Kher for P. G. Padhye — for the Opponent (Applicant).

S. G. Patwardhan, Government Pleader—for the Crown.

Jahagirdar J.—This case raises an interesting question about the liability of the father under S. 488, Criminal P. C., to maintain his married daughter. The applicant before us had been ordered on 11th March 1943, by the Magistrate to pay maintenance to his wife and four children at the rate of Rs. 40 per month, that is Rs. 16 to his wife, the opponent before us, and Rs. 6 to each of his four children. The opponent applied to the Presidency Magistrate, 7th Court, Dadar, Bombay, for the enhancement of the amount of maintenance for herself and her children, in view of the fact that the applicant's salary is now increased. The opponent also made an application praying that the amount ordered to be paid in 1943 be reduced as the eldest daughter is now married. The learned Magistrate rejected the application of the opponent and enhanced the amount of maintenance in respect of the opponent and her three children. He, however, refused to enhance the amount of maintenance in respect of the married daughter, who is now said to be 15 years old. The applicant comes in revision against the said order.

[2] Miss Navalkar, the learned advocate for the applicant, contends that under Hindu law the moment a daughter is married she gets an en-

forceable right to be maintained by the husband and she cannot therefore be described as unable to maintain herself within the meaning of S. 488, Criminal P. C., and the father ceases to be liable to maintain his married daughter. In support of her contention she relies upon a ruling of the Madras High Court in *Chantan v. Mathu*, 39 Mad. 957 : (A. I. R. (4) 1917 Mad. 276 : 17 Cr. L. J. 16) where it has been held that a child that possesses a right to maintenance from its mother's *tavazhi* is not entitled under S. 488 to an order for maintenance. In dealing with this point, Abdur Rahim J. observes (p. 958) :

".... The ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained... by some other person as to a child which is able to earn a living by its own exertions."

Ayling J. concurs with this view. He observes (p. 958) :

"I think that a child which possesses a legally enforceable right to maintenance from its mother's *tarwad* stands in the same position as a child which possesses property in its own right, and that neither can be regarded as 'unable to maintain itself' within the meaning of section 488."

With great respect we are unable to accept this view. The right to maintenance under this section is a distinct statutory right irrespective of the personal law of the parties. Section 488 provides only a speedy remedy against starvation for a deserted wife or a child. It provides for a summary procedure which does not cover entirely the same ground as the civil liability of a husband or father under his personal law to maintain his wife or child. A legally enforceable right to maintenance at the hands of a third person cannot mean the same thing as ability to maintain. It may take some years to enforce a legal right in a Court of law. In the meanwhile the wife or the child has to live. A wife under Hindu law has enforceable right against her husband for her maintenance and yet S. 488 enables her to resort to this summary remedy. When substantial issues of civil law are raised between the parties, their remedy lies only in the civil Courts. Under S. 488, a person having sufficient means and neglecting or refusing to maintain his wife or child unable to maintain himself can be ordered to pay maintenance to his wife and child. Though the word 'child' has not been defined in the Code it has been however held that a person is a child for the purposes of this section till he attains the age of majority : *Hemanta Kumar Banerji v. Manorama Debi*, 62 Cal. 639 : (A. I. R. (22) 1935 Cal. 488 : 36 Cr. L. J. 1114). Under this section, a daughter does not on marriage *ipso facto* lose her right of maintenance from the father. The real and only test is whether that child is unable to maintain

itself. It may be that the husband himself is a child or too poor to maintain her. In *Meenatchi Ammal v. Muthuswami Pillai*, 48 Mad. 503 : (A. I. R. (12) 1925 Mad. 491 : 26 Cr. L. J. 732) it has been held that the father must continue to maintain his daughter even after her marriage, if in spite of her marriage she still remains unable to maintain herself either because her husband is too poor to maintain her or for any other good reason.

[3] In that case, on the application of the father, the Magistrate had cancelled altogether the maintenance allowed to the daughter on the ground that she was married. Krishnan J. observes (p. 504) :—

"It seems to me that the question really turns upon whether the altered circumstances are such that the child has become able to maintain herself. If she has become able to maintain herself by reason of her marriage and ceased to depend on the original maintenance, I would be prepared to hold that the cancellation under S. 489, Criminal P. C. would be the proper order to make, but if, in spite of her marriage, the girl still remains unable to maintain herself either because her husband is too poor to maintain her or for any other good reason, the father's liability to maintain the child would still exist under section 488."

[4] The learned Judge set aside the order and sent the case back to the Magistrate for passing fresh orders in the light of the above observations.

[5] The learned Magistrate in this case no doubt refers to *Meenatchi Ammal v. Muthuswami Pillai*, 48 Mad. 503 : (A. I. R. (12) 1925 Mad. 491 : 26 Cr. L. J. 732) but he has failed to find out as to whether the daughter is living with her husband or whether she still remains unable to maintain herself.

[6] We, therefore, set aside the order directing the applicant to pay maintenance to his married daughter and send back the case to the learned Magistrate to pass fresh orders after ascertaining whether in spite of her marriage she is still unable to maintain herself, either because her husband is too poor to maintain her or for any other good reason.

R.G.D.

Order set aside.

A. I. R. (36) 1949 Bombay 37 [C. N. 11.]

SEN AND JAHAGIRDAR JJ.

Bashan Madar Korbu — Applicant v. Emperor.

Criminal Revn. App. No. 20 of 1948, Decided on 4th February 1948, from order of Dist. Magistrate, Sholapur.

(a) Bombay Public Security Measures Act (VI [6] of 1947), S. 2 (1) (a) and S. 2 (4)—Sub-ss. (1) (a) and (4) have to be read together—District Magistrate cannot pass order under S. 2 (4) detaining person in jail situated outside his territorial jurisdiction—Such order cannot be validated by Government.

Sub-section (4) of S. 2 has to be read with S. 2 (1) (a). An order passed under S. 2 (1) (a) if it merely says

that a certain person be detained would be incomplete and unenforceable unless some place of detention is mentioned therein, and though under S. 2 the two orders can be separately passed, still the orders passed under S. 2 (1) (a) and S. 2 (4) have got to be read together and they form one order and they cannot be separated.

Thus, where the District Magistrate of Sholapur passes an order under S. 2 (4) detaining a person in the Yeravda Jail in the Poona District, the order is without jurisdiction, in view of the Notification No. 671, dated 26th April 1947, under which the powers have to be exercised by the District Magistrate within the jurisdiction. Such an order cannot be separated from the one passed under S. 2 (1) (a). Such an illegal order cannot be revalidated under S. 2 (4) by the Government. Cr. Appln. Nos. 660 to 662 of 1947 (Bom), *Foll.* [Para 4]

(b) Bombay Public Security Measures Act (VI [6] of 1947), S. 2 — Order under, stating detenu was acting prejudicial to public safety of Sholapur city — Order under S. 3 giving grounds having no connection with tranquillity of city of Sholapur — Order of detention held bad.

Where the District Magistrate had not applied his mind to the facts of the case at the time when he signed the order of detention under S. 2 (1) (a), inasmuch as the order passed under S. 2 stated that the detenu was acting in a manner prejudicial to the public safety, etc., of the Sholapur city, but the grounds mentioned in the order passed under S. 3 had no connection whatsoever with the tranquillity of the city of Sholapur :

Held that the order of detention was bad. [Para 5]

(c) Bombay Public Security Measures Act (VI [6] of 1947), Ss. 2 and 3 — Detention of person without showing order under S. 2 (1) (a) for some days, deprecated.

Detention of person without being shown an order of detention for some days and then serving upon him not an order of detention under S. 2 (1) (a) but a notice under S. 3 setting forth grounds of detention, deprecated.

[Para 6]

A. A. Peerbhoy and V. H. Kamat — for Applicant.

S. B. Jathar, Assistant Government Pleader for the Government Pleader — for the Crown.

Jahagirdar J. — This is an application made under S. 491, Criminal P. C., by the brother-in-law of the detenu, Shaikhul Shamsoddin Kotwal praying that the order of detention passed against him by the District Magistrate of Sholapur on 25th November 1947, be set aside and that he be ordered to be released. The facts of the case are briefly these:

[2] The detenu is a resident of Tadavale, in taluka Barsi, District Sholapur. He was arrested on 22nd November 1947, at Tadavale, was brought to Sholapur and was kept in Sholapur jail from 25th November 1947 to 2nd December 1947. It is the case of the detenu that no order of any detention was shown to him at the time when he was arrested or when he was kept in Sholapur Jail. Then on 2nd December 1947, he was removed to Yeravda Central Prison. About 8th December 1947, a copy of the notice of the grounds of detention under S. 3, Public Security Measures Act, dated 25th November 1947, was served upon him. The notice, after setting out the grounds for detention, stated that he had a right to make a repre-

sentation to the District Magistrate of Sholapur through the Superintendent of Yeravda Central Prison. The present application is filed praying that he may be set at liberty.

[3] Two points have been made out by Mr. Peerbhoy, the learned counsel for the petitioner, viz., that the order of detention by the learned District Magistrate of Sholapur requiring him to be detained at Yeravda is beyond his jurisdiction and therefore null and void, and, secondly, the order is bad because the order passed under S. 2 says that 'he is acting in a manner prejudicial to the public safety, the maintenance of public order, the tranquillity of the Sholapur City.' But the grounds mentioned in the notice served upon him under S. 3 have nothing to do with the Sholapur City. The grounds mentioned in that notice are :

"Your village is the last village of the border of this district. Your movements have been very suspicious. Your activities these days have been prejudicial to the public peace, safety and convenience of this District." So his contention is that the ground mentioned in the order of detention under S. 2 is at variance with the grounds that are mentioned in the notice served upon him under S. 3, that the grounds are vague and that the learned District Magistrate has not properly applied his mind to the facts of the case.

[4] Now, as regards the first point, about the order of detention being *ultra vires* and beyond his jurisdiction, the contention is that the learned District Magistrate has passed an order under S. 2(1) (a) on 25th November 1947, that the detenu may be detained. On the same day he passed another order purporting to be passed under S. 2, sub-s. (4), directing that the detenu shall be detained in Yeravda Central Prison. A third order is passed on the same day under S. 3 intimating to him the grounds of detention and informing him that he has a right to make a representation to him against that order through the Superintendent of Yeravda Prison. So, if these orders are read together, it is clear that the District Magistrate of Sholapur has ordered the detention of the detenu at Yeravda which is outside his jurisdiction. The Notification No. 671 dated 26th April 1947, under which the powers under S. 2 have been delegated to the District Magistrate states that 'the power shall be exercised by the District Magistrate within his own jurisdiction.' So under the Notification the District Magistrate gets his authority to pass an order under the section and he has got to act within his own territorial jurisdiction. It is therefore clear that he cannot pass an order requiring the detenu to be detained at Yeravda which is in Poona District. But it is contended by the learned Assistant Government Pleader that the order passed under S. 2 (1) (a) is separable from the

order passed under S. 2 (4) and that the order passed under S. 2(1) (a) is a valid order, though his order passed under S. 2 (4) may be an invalid order, and that at a time when the order passed under S. 2 (1) (a) was still in force, the Government have by a later order validated the detention of the detenu at Yeravda Jail, that this last order is a perfectly valid order. But we think that this argument cannot be accepted. It is true that S. 2 (1) (a) does not require the District Magistrate to pass an order that he shall be detained at any specified place. It merely states that the District Magistrate, provided the circumstances justify it, shall make an order directing that he be detained. But S. 2 (4) provides that

"So long as there is in force in respect of any person an order under cl. (a) of sub-s. (1), he shall be liable to be removed to, and detained in, such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline as the Provincial Government may from time to time by general or special order specify."

So sub-s. (4) of S. 2 has got to be read with S. 2 (1) (a). An order passed under S. 2 (1) (a) if it merely says that he be detained would be incomplete and unenforceable unless some place of detention is mentioned therein, and though under S. 2 the two orders can be separately passed, still we think that the orders passed under S. 2 (1) (a) and S. 2 (4) have got to be read together and they form one order, and, if that be so, the intention is perfectly clear that the District Magistrate, Sholapur, purported to pass the order detaining him not in Sholapur Jail but in Yeravda Jail. Mr. Peerbhoy has invited our attention to *In re Baboorao Sripat Deshmukh*, Criminal Application Nos. 660 to 662 of 1947, decided on 2nd December 1947 by Chagla Ag. C. J., and Gajendragadkar J. In that case the order of detention was passed by the District Magistrate of East Khandesh and a copy of the order of detention was sent to the Superintendent of Nasik Jail, and the detenu was detained in Nasik Jail, and their Lordships held that such an order was beyond his jurisdiction and he had no power to detain him outside the territorial limits of his District. Their Lordships observe as follows:

"In all these three cases the detenues have been detained by an order of the District Magistrate at the Nasik Jail. Nasik is not within the jurisdiction of the District Magistrate, East Khandesh, and therefore in ordering their detention outside his jurisdiction he has exercised a power which was not delegated to him under the notification of 26th April 1947. There is no doubt that the Provincial Government can detain a detenu anywhere within the Province, but when that power is exercised by an authority to whom that particular power is delegated, the delegation is circumscribed by territorial considerations and the detention can only be within his own jurisdiction."

So, following this case, we hold that the order of detention passed by the District Magistrate on

25th November 1947, is illegal. As we hold that the original order passed by the District Magistrate, Sholapur, was illegal, the Government have no power to revalidate the same under S. 2 (4) of the Act.

[5] The second point urged is that the order passed under S. 2 states that the detenu was acting in a manner prejudicial to the public safety, etc., of the Sholapur City. Now, the order, excepting the name of the detenu, is typed, including the place, 'Sholapur City'. But if we turn to the order passed under S. 3, the grounds mentioned therein have no connection whatsoever with the tranquillity of the City of Sholapur. This itself clearly shows that the learned District Magistrate had not even applied his mind to the facts of this case at the time when he signed the order of detention under S. 2 (1) (a). For this reason also the order has got to be held to be bad.

[6] It has been brought to our notice that the order of detention under S. 2 (1) (a) has not been served upon the detenu at any time and he was detained without being shown any order of detention from 23rd November 1947 to 8th December 1947, and on 8th December 1947, what was served upon him was not the order of detention under S. 2 (1) (a) but a notice under S. 3 setting forth the grounds of his detention. These allegations have been made in the sworn application before us and they have not been contradicted in the affidavit of the District Magistrate, Sholapur, and we think that this is not a very satisfactory position. The attention of the Government is invited to this unhappy position and it is hoped that such a thing will not occur again.

[7] We, therefore, allow the application, make the rule absolute, and order that the detenu be released forthwith. The detenu is entitled to his costs from the Government.

R.G.D.

Rule made absolute.

A. I. R. (36) 1949 Bombay 39 [C. N. 12.]

CHAGLA C. J. AND TENDOLKAR J.

The Municipal Corporation of Bombay—Assessee v. Commissioner of Income-tax, Bombay City.

Income-tax Ref. No. 5 of 1947, Decided on 23rd March 1948.

Income-tax Act (1922), S. 4 (3) (iii) — Income of local authorities—Bombay City Corporation supplying water to Government and other persons outside city of Bombay—Income derived from it is taxable to income-tax—City of Bombay Municipal Act (III [3] of 1888), Ss. 88, 261, 288, 63 (k).

Under S. 88, City of Bombay Municipal Act, the Water Works vest in the Municipal Corporation of the City of Bombay in trust for the purposes of the Act. Water is supplied to the City as an obligatory duty under S. 261 of the Act, and to the extent that water is supplied outside the City of Bombay to Government and other indivi-

duals, it is under the power conferred upon the Commissioner under S. 288 of the Act. [Para 3]

In supplying water to Government and other persons outside the limits of the City of Bombay the Municipality carries on a trade or business. [Para 4]

The jurisdiction of the Municipal Corporation of the City of Bombay, is the City of Bombay. Its jurisdiction does not extend outside that area merely because it owns properties outside the area. Because the water works which are situated outside the limits of Bombay are the property of the Municipality, and because the water is supplied from the meter situated on that property, the supply of water cannot be said to be within the jurisdictional area of the Municipality. Therefore, the activity carried on by the Municipality does not fall within the exemption mentioned in sub-cl. (iii) of S. 4 (3), and, therefore, the income derived by the Municipality is liable to tax. [Para 5]

C. K. Daphtary, Advocate-General and Sir Jamshedji Kanga—for Assessee.

G. N. Joshi and R. J. Kolah—for Commissioner of Income-tax.

Chagla C. J.—The assessee in this case is the Municipal Corporation of the City of Bombay, and in the year of account 1938-39 the Corporation supplied water outside the City of Bombay to Government and other persons. The total receipts from this supply amounted to Rs. 4,12,366, and the question is whether the income derived by the Corporation by the supply of water is subject to tax. This water was supplied from the Municipal water works situated outside the City of Bombay on property belonging to the Corporation and the supply was metered at the water works. The Municipal Corporation's contention is that the surplus of receipt over expenditure with regard to this supply is exempt from income-tax under S. 4. (3) (iii), Income-tax Act.

[2] Now, sub-s. (3) of S. 4 contains various kinds of incomes which are not to be included in the total income of the person receiving it, and one of those kinds of income is the one mentioned in sub-cl. (iii) of that sub section which is the income of local authorities. But the exemption does not apply to the income of local authorities if (1) that is derived from a trade or business, (2) that income arises from the supply of commodity or services, and (3) if the supply of the commodity or service is outside the jurisdictional area of the local authority.

[3] Turning to the scheme of the Municipal Act, S. 1 provides that the Act extends only to the City of Bombay except as otherwise expressly provided by the Act itself. Then Chapter III sets out the duties and powers of the Municipal authorities, some are obligatory and the others are discretionary, and S. 61 contains those duties which are obligatory upon the Municipal authorities, and sub-cl. (b) of S. 61 refers to the construction and maintenance of works and means for providing a supply of water for public and private purposes. There-

fore, this is one of the obligatory duties of the Municipal Corporation. Section 63 deals with matters which in their discretion the Corporation may provide and I may refer to one of these which is mentioned in sub-cl. (k) "any measure not hereinbefore specifically named, likely to promote public safety, health, convenience or instruction." Section 87 gives the power to the Corporation to acquire and hold movable and immovable property, whether within or without the limits of the City, and S. 88 provides that all property held by the Corporation is vested in it in trust for the purposes of the Municipal Act. Chapter X deals with water supply and S. 261 provides for the supply of water to the City of Bombay and S. 262 provides that the Municipal water-works shall be managed and kept in repair by the Municipal Commissioner. Section 288 gives the power to the Commissioner to supply water from a municipal water-work to any local authority or person without the City on such terms as to payment and as to the period and conditions of supply as shall be, either generally or specially, approved by the Corporation. Therefore, it is clear that the water-works vest in the Municipality in trust for the purposes of the Act. Water is supplied to the City as an obligatory duty under S. 261 of the Act, and to the extent that water is supplied outside the City of Bombay to Government and other individuals, it is under the power conferred upon the Commissioner under S. 288 of the Act.

[4] The first question that arises is whether in supplying water to Government and other persons outside the limits of the City of Bombay the Municipality is doing any trade or business. A trade or business is an operation from which income or profits can be derived. That operation must have certain method and continuity about it, and there can be no doubt that the Municipality has been deriving income from supplying water to Government and other individuals outside the City of Bombay. Therefore, this operation of the Municipality must be characterised as the carrying on of a trade or business. There is no doubt that the income arises from the supply of a commodity or service because the Municipality as the local authority supplies water to Government and other individuals.

[5] The third question is whether this supply is outside its jurisdictional area. The jurisdiction of the Municipality is the City of Bombay. Its jurisdiction does not extend outside that area merely because it owns properties outside the area. It is perfectly true that the water-works which are situated outside the limits of Bombay are the property of the Municipality, and the Advocate-General's contention is that inasmuch

as the water is supplied from the meter situated on the property of the Municipality, the supply of water is within the jurisdictional area of the Municipality. We are unable to accept that contention, because the mere owning of property does not extend the jurisdiction of the Bombay Municipality. That jurisdiction essentially is confined to the limits of the City of Bombay. It has also been contended by the Advocate-General that in doing what it has done the Bombay Municipality has discharged a discretionary duty cast upon it by the statute and to that extent it has been doing a Municipal function and not doing trade or business. It is suggested that the supply of water falls within S. 63 (k) as constituting a measure for the promotion of public health and convenience. In my opinion the whole of Chap. III which deals with duties and powers of the Municipal authorities deals with those duties and powers which are to be discharged by the Municipal authorities within the jurisdiction of the Municipality, viz., within the limits of the City of Bombay. These obligatory and discretionary duties of the Corporation are not to be discharged outside the limits of the City. It is only under S. 288 which, as I have pointed out earlier, falls under Chap. X which specifically deals with water supply that the Commissioner is empowered to supply water to any local authority or person outside the city limits. But that power which is conferred under S. 288 cannot be looked upon either as an obligatory or a discretionary duty cast upon the Corporation. Therefore, the activity carried on by the Municipality does not fall within the exemption mentioned in sub-cl. (iii) of S. 4 (3), and, therefore, the income derived by the Municipality is liable to tax. The answer to the question, therefore, will be in the negative. The assessee to pay the costs.

[6] **Tendolkar J.**—I agree.

R.G.D.

Answer accordingly.

A. I. R. (36) 1949 Bombay 41 [C. N. 13.]

FULL BENCH

CHAGLA C. J., BAVDEKAR AND GAJENDRAGADKAR JJ.

Emperor v. Peter D'souza.

Criminal Revn. Appln. No. 730 of 1947, Decided on 12th April 1948, referred by Sen and Jahagirdar JJ., D/- 10th March 1948.

Bombay Abkari Act (V [5] of 1878), S. 43 (as amended by Bombay Act XXIX [29] of 1947) — Effect of amendment — It is not obligatory upon Court to impose upon accused sentences of both imprisonment and fine.

The effect of the amendment made in S. 43, Bombay Abkari Act, by Bombay Act XXIX [29] of 1947 is that on a conviction, the accused is not necessarily to be punished with the imprisonment of six months and with fine; but he is 'punishable' or liable to be punished

with imprisonment and with fine. The word 'punishable' imports discretion, and it is left to the discretion of the Court to impose a sentence of imprisonment or a sentence of fine or both. And as the words 'such imprisonment and fine' occurring in the proviso refer to the preceding clause, they also indicate that the sentence is left to the discretion of the Court. It is not, therefore, obligatory upon the Court to impose upon the accused both the sentence of imprisonment and the sentence of fine. [Paras 1, 2]

S. G. Patwardhan, Government Pleader

— for the Crown.

Chagla C. J.—The case referred to us to this Full Bench raises a very short question of construction of S. 43 of the Abkari Act. Section 43 of the Act before it was amended contained the penal provision in the following terms :

"Shall, on conviction, be punished for each such offence with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

The amendment altered the penal provision to read as follows :

"Shall, on conviction, be punishable for the first offence with imprisonment for a term which may extend to six months and with fine which may extend to Rs. 1000 :

Provided that in the absence of special reasons to the contrary to be mentioned in the judgment of the Court, such imprisonment shall not be less than three months and fine shall not be less than Rs. 500."

Now, it is contended by the Government Pleader that, inasmuch as the word "or" has been replaced by "and" the sentence for the first offence has been made cumulative. In other words, it is obligatory upon the Court to impose upon the accused both the sentence of imprisonment and the sentence of fine. Although the Legislature has altered "or" to "and," it is also significant that it has altered the expression "punished" for the expression "punishable." Therefore, on a conviction, the accused is not necessarily to be punished with the imprisonment of six months and with a fine; but he is punishable, or liable to be punished, with imprisonment of six months and with fine which may extend to Rs. 1000. Therefore, "punishable" imports discretion, and it is left to the discretion of the Court to impose a sentence of imprisonment or a sentence of fine or both. "Imprisonment and fine" in this context must and does mean "imprisonment and/or fine."

[2] The Government Pleader emphasises the fact that in the subsequent clause, which lays down the minimum sentence to be imposed, the expression "and" again occurs, and according to him the object of the Legislature was that the minimum sentences to be inflicted should be both that of imprisonment and of fine. As regards imprisonment, the minimum should be three months, and as regards fine the minimum should be Rs. 500. But in the latter clause the phrase used is "such imprisonment shall not be less

than three months and fine shall not be less than Rs. 500." Therefore, in order to construe "such imprisonment and fine" we have got to refer to the preceding clause, and, as I have pointed out, in the preceding clause the sentence is left to the discretion of the Court, whether to inflict imprisonment, or to inflict fine or both.

[3] If it is at all necessary, we may look at the analogous provision with regard to punishment to be found in S. 302, Penal Code. There the sentence for murder is death or transportation for life. The expression used is "shall be punished with death, or transportation for life." That makes it obligatory upon the Court, when a man has been convicted of murder, to punish him with death or transportation for life; and then the sentence that follows is "and shall also be liable to fine." That makes a fine discretionary, because it is left to the discretion of the Court whether to inflict a fine or not. Fine is not cumulative with death or with transportation for life.

[4] Similarly, here, the imprisonment of six months and the fine of Rs. 1000 are not cumulative sentences, but sentences to be inflicted according to the discretion of the Court.

[5] The Government Pleader argues that if this be the construction, the amendment of the Act has brought about no change whatsoever. That is not correct, because, whereas before the Court had full discretion to impose any sentence of imprisonment or to inflict any fine, now the discretion is cut down in the case of imprisonment to three months and in the case of fine to Rs. 500, unless the Court for special reasons to be recorded in the judgment takes a different view.

[6] Therefore, in our opinion, it is not obligatory upon the Court to inflict both the sentence of imprisonment and the sentence of fine.

v.S.B.

Answer accordingly.

A. I. R. (36) 1949 Bombay 42 [C. N. 14.]

CHAGLA C. J. AND TENDOLKAR J.

Kavasji Pestonji Dalal — Plaintiff v. Rustomji Sorabji Jamadar and another — Defendants.

O. C. J. Suit No. 385 of 1946, Decided on 6th April 1948.

(a) **Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII [57] of 1947), Ss. 28, 29 and 50 — Ordinary original jurisdiction of High Court is alone taken away—But Extra-ordinary Original Jurisdiction and revisional powers left intact—It is within powers of Provincial Legislature to take away Ordinary original jurisdiction — Government of India Act (1935), S. 224, Sch. 7, List 2, items 2 and 21, and List 3 item 4.**

What is affected by S. 28 is the Ordinary Original Civil jurisdiction of the High Court. The revisional power of the High Court has in no way been affected

and the power given to the High Court under Cl. 13, Letters Patent, to remove and to try and determine any suit falling within the jurisdiction of the lower Courts also remains unaffected. Thus, though the High Court has ceased to possess ordinary original jurisdiction with regard to suits between a landlord and tenant which were cognisable by it under Cl. 12, Letters Patent, its Extra-ordinary original civil jurisdiction under Cl. 13, Letters Patent and its revisional powers under S. 115, Civil P. C., are otherwise continued as before and have been in no way affected or modified. [Para 4]

Assuming that the High Court has still got the power of judicial interference under S. 224, Government of India Act, Ss. 28, 29 and 50 do not in any way affect that power. [Paras 11, 31]

It is within the powers of the Provincial Legislature to deprive the High Court of its original civil jurisdiction in matters dealt with in the Bombay Act LVII [57] of 1947. The subject-matter of the Act falls within item 21 in List 2. Item 2 in the same List deals with jurisdiction and powers of all Courts, except the Federal Court with respect to any of the matters in this List, and the Provincial Legislature can affect the jurisdiction and power of the High Court with respect to questions relating to tenancy legislation. Civil Procedure falls in List 3 being item 4. Within its own domain although the Provincial Legislature is the creature of the Government of India Act, it is supreme and sovereign. [Paras 5, 23]

Merely to pass a law with regard to tenancy legislation and to confer jurisdiction upon certain Courts and take away the jurisdiction of the High Court is not something so outrageous, as to say that the attempt of the Provincial Legislature is gradually to deprive the High Court of its original jurisdiction in respect of various classes of cases so that ultimately its powers should become truncated and its prestige should disappear, especially when the High Court continues to retain its power and jurisdiction unimpaired and unaffected to exercise its revisional power and also its Extra-ordinary original jurisdiction. Whether it is right or wrong for the Legislature to confer such vast powers upon a Court of summary jurisdiction is entirely a matter for Government and for the Legislature. [Para 20]

As regards the powers of the Provincial Legislature to affect the powers of the High Court under Letters Patent, although Cl. 44 permitted only the Central Legislature to amend the Letters Patent, after the passing of the Government of India Act, 1935, it was the appropriate Legislature which was given that power and under the Government of India Act, 1935, the only appropriate Legislature which can modify or alter the Letters Patent is the Provincial Legislature with regard to those matters which fall within its competence, and if the matter is tenancy legislation then the jurisdiction of the High Court can only be affected by the Provincial Legislature. [Para 15]

As a result of the passing of the Bombay Act LVII [57] of 1947, the Small Cause Court may get jurisdiction to try suits involving questions of title. This may be a valid criticism against this legislation but a Legislature which is sovereign is not bound to exercise its power with discretion, and it is not for the Court to consider the wisdom, the expediency or the policy of the legislation that it may enact. The only question that the Court has to consider is whether the legislation is within the legislative competency of the Legislature. [Para 6]

(b) **Government of India Act (1935), S. 224 (2)—Prohibition refers to judgments not otherwise subject to appeal or revision to High Court.**

The prohibition under sub-s. (2) of S. 224 only refers to those judgments of an inferior Court which are not otherwise subject to appeal or revision to the High Court. The prohibition cannot and does not apply to judgments which are subject to appeal or revision. If, S. 224 (1) gave the High Court the power of judicial interference, that power obviously has not been wholly taken away, but it has been taken away to the extent of those judgments which are not subject to appeal or revision. In other words, if a judgment is subject to appeal or revision, the High Court would still have the power to interfere judicially apart from and over and above merely dealing with those judgments in appeal or revision. The marginal note to the section does not control the section: *Case law considered.*

[Paras 10, 27, 28, 30]

(c) Interpretation of Statutes—Marginal note — Section clear and unambiguous — Marginal note does not control the section. [Paras 10, 27]

(d) Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII [57] of 1947), S. 49 (2) (iii) — High Court's powers to make rules under S. 224 (1) (b), Government of India Act, 1935, is not impinged upon by S. 49 (2) (iii) — Government of India Act (1935), S. 224 (1) (b).

Power of the High Court to make rules under S. 224 (1) (b), Government of India Act is subject to an important proviso that such rules, forms and tables shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor. Therefore, the very proviso contemplates any competent law providing for these very matters and the power of the High Court is only to make rules which are not inconsistent with any law for the time being in force, and therefore it is perfectly competent to the Provincial Legislature to make rules regulating the procedure of suits to be filed under the Act. Consequently it cannot be said that S. 49 (2) (iii), Bombay Act (LVII [57] of 1947) impinges upon the power of the High Court under S. 224 (1) (b). [Para 12]

(e) Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII [57] of 1947), Ss. 28, 29 and 50 — Sections do not affect High Court's power to transfer cases to itself — Government of India Act (1935), S. 225—Letters Patent (Bombay), Cl. 13.

The power of the High Court to transfer cases to itself under Cl. 13, Letters Patent, remains unaffected and, therefore, the power of the High Court under S. 225, Government of India Act, has not been in any sense taken away by Ss. 28, 29 and 50, Bombay Act. [Paras 13, 32]

(f) Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII [57] of 1947), Ss. 28, 29 and 50—Sections do not impugn powers of Federal Court under Ss. 205 or 206, Government of India Act, 1935.

The jurisdiction of the Federal Court, whether under S. 205 or S. 206, arises only on a judgment, decree or final order being passed by the High Court and it cannot possibly be suggested that Act LVII [57] of 1947 excludes any appeal to the Federal Court from a decision of the High Court, since no appeal to the High Court lies under the Act. [Paras 16, 33, 34]

(g) Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII [57] of 1947), S. 50—Is not *ultra vires* because it takes away vested right to appeal to Federal Court.

Per *Chagla C. J.* — It is within the competence of the Provincial Legislature to take away the vested

right of appeal to the Federal Court in pending cases. Consequently, S. 50, Bombay Act LVII [57] of 1947 is not *ultra vires* because it seeks to transfer suits pending before the High Court and thus deprives the litigants of their vested right to appeal before the Federal Court: A. I. R. (30) 1943 F. C. 36, *Rel. on.*

[Para 19]

Per *Tendolkar J.*—Depriving litigants of their right to go to the Federal Court in a possible contingency is not depriving the Federal Court of jurisdiction in any sense of the word. Jurisdiction of the Court and the right of the litigant to resort to it are two distinct matters. The jurisdiction of the Federal Court is in no manner affected, because the litigants in pending suits have been deprived of their right to go to the Federal Court in a possible contingency. [Para 38]

(h) Appeal—Right of—Pending actions—Vested right of appeal—Can be taken away only by express provisions of law.

No litigant has any right to have his litigation decided by any particular procedure and all procedural laws are therefore retrospective in their character and affect even suits filed prior to the passing of such legislation. But a right of appeal which a suitor has in a pending action is not merely a matter of procedure. It is a vested right and the Legislature cannot take away that right retrospectively unless it does so by express words or necessary intendment. (1905) A. C. 369 and A. I. R. (15) 1928 Cal. 640 (F.B.), *Rel. on.*

[Para 17]

(i) Interpretation of Statutes—Statute affecting jurisdiction.

In dealing with a statute which affects the jurisdiction of superior Courts the jurisdiction of such Court, shall not be excluded except by clear words to that effect. [Para 31]

H. M. Seervai and R. J. Joshi—for Plaintiff.

P. P. Khambatta and B. M. Mistry —

for Defendant 1.

C. K. Daphtary and M. M. Desai —

for Defendant 2.

Chagla C. J. — This is a suit filed by the plaintiff to eject his tenant. The defendant has pleaded the protection of the Rent Restriction Act. At the hearing of the suit before Desai J. attention was drawn to the relevant provisions of Bombay Act LVII [57] of 1947 under which all pending suits relating to recovery or fixing of rent or possession of premises to which that Act applied had to be transferred to and continued before the Court of Small Causes, Bombay. It was then contended both by the plaintiff and the defendant that Ss. 28, 29 and 50 of that Act were *ultra vires* of the Provincial Legislature and were also repugnant to existing law and void and of no effect. Desai J. directed that the plaint should be amended to make the necessary averments and that the Province of Bombay should be made a party to the suit. Consequently the plaint was amended and para. 12A was added containing the relevant averments and the Province of Bombay was made a party defendant to the suit. As the questions raised were of considerable importance, Desai J. requested me to constitute a Divisional Bench to hear the suit.

I thereupon directed that the suit should be placed before me and my brother Tendolkar J. and it has now come on for hearing.

[2] The contention that ss. 28, 29 and 50 of Act LVII [57] of 1947 were repugnant to any existing law and, therefore, void and of no effect was not pressed at the hearing and in fact given up. Therefore, two of the three preliminary issues which arise survive and have to be considered by us, and these are whether ss. 28, 29 and 50 are *ultra vires* of the Provincial Legislature and whether this Court has jurisdiction to try the suit.

[3] Act LVII [57] of 1947 is an amending and consolidating Act relating to the control of rents and repairs to certain premises and of rates of hotels and lodging houses and of evictions. In order to determine whether the impugned ss. 28, 29 and 50 are *ultra vires* of the Provincial Legislature, we have to consider not the form of these sections but their pith and substance. The effect of these sections is that in Greater Bombay, the Court of Small Causes, and elsewhere in the Province, the Court of the Civil Judge (Junior Division) are constituted the sole Courts for trying suits or proceedings between a landlord and tenant relating to the recovery of rent or possession of any premises and of deciding any application made under the Act and for dealing with any claim or question arising out of the Act. It is provided that an appeal shall lie in Greater Bombay from a decree or order made by the Court of Small Causes to a Bench of two Judges of the same Court which Bench is not to include the Judge who passed such decree or order and elsewhere an appeal is provided to the District Court from a decree or order made by a Civil Judge. It is also provided that all suits and proceedings other than execution proceedings and appeals of the nature cognisable by the Small Cause Court and the Court of the Civil Judge (Junior Division) under s. 28 pending in any Court are to be transferred to and continued before those Courts.

[4] As I read s. 28, it deals with original suits or proceedings or applications between a landlord and a tenant and this section requires that they have to be filed either in the Court of Small Causes in Greater Bombay or in the Court of the Civil Judge (Junior Division) elsewhere. Therefore, it is clear that as far as the High Court is concerned, where it had jurisdiction before to entertain such suits, proceedings or applications, that jurisdiction has been taken away. The prohibition against Courts other than the Court of Small Causes and the Court of the Civil Judge (Junior Division) to deal with any claim or question arising out of the Act or any of its provisions refers only to my mind to such claims

or questions arising in suits, proceedings or applications. What is, therefore, affected is the ordinary original civil jurisdiction of this Court. This argument receives further support from considering the provisions of s. 29 which deals with appeals while s. 28 deals with original hearing. It is to be noted that any revision that may lie from any order or decree passed by the Court of Small Causes or the Court of the Civil Judge (Junior Division) is not barred under the Act and, therefore, it is again clear that the revisional power of the High Court has in no way been affected. Both the Court of Small Causes and the Court of the Civil Judge (Junior Division) are Courts subject to the superintendence of the High Court and the power given to the High Court under cl. 13, Letters Patent, to remove and to try and determine any suit falling within the jurisdiction of either of these Courts also remains unaffected. To sum up, the High Court has ceased to possess ordinary original jurisdiction with regard to suits between a landlord and tenant which were cognisable by it under cl. 12, Letters Patent, but its extraordinary original civil jurisdiction under cl. 13, Letters Patent, and its revisional powers under s. 115 of the Code are otherwise continued as before and have been in no way affected or modified. To my mind, the contention of Mr. Seervai that the High Court is debarred from dealing with any claim or question arising out of the Act or any of its provisions, however such claim or question may arise or in whatever proceeding, is untenable. "To deal with such claim or question" must be read with reference to "any such suit, proceeding or application," and the prohibition only applies to "such suit, proceeding or application." The Legislature has provided no prohibition against the High Court dealing with such claim or question otherwise than in the exercise of its ordinary original civil jurisdiction. The very fact that under s. 50 execution proceedings and appeals are allowed to continue before the High Court, if they were already pending, clearly shows that the prohibition is not a total prohibition but only of a restricted character.

[5] The short question that therefore arises is whether the Provincial Legislature has the power to deprive the High Court of its original civil jurisdiction in certain stated matters. The scheme of the Government of India Act, 1935, is to distribute legislative powers between the Central and Provincial Legislatures. Schedule 7 to the Act contains three Lists: List I enumerates matters with respect to which the Federal Legislature has the sole power to make laws; List II enumerates matters with respect to which the Provincial Legislature has the sole power to

legislate; and List III enumerates subjects in respect of which both the Federal Legislature and the Provincial Legislature have the power to make laws. In case of conflict or overlapping, List I prevails over List II and List III prevails over List II. Item No. 21 in List II deals among other things with land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents, and it is not disputed that the subject-matter of Act LVII [57] of 1947 falls within this item. Item No. 2 in the same List deals with jurisdiction and powers of all Courts, except the Federal Court with respect to any of the matters in this List, and it is also not disputed that the Provincial Legislature can affect the jurisdiction and power of the High Court with respect to questions relating to tenancy legislation. Civil Procedure falls in List III being item 4. It is also now well settled that within its own domain although the Provincial Legislature is the creature of the Government of India Act, it is supreme and sovereign.

[6] Mr. Seervai has forcefully and eloquently emphasised the fact that the result of this legislation would be to confer upon the Small Causes Court jurisdiction to try suits which may involve questions of title, that the Small Cause Court is a Court of summary jurisdiction and that it is not suited or equipped to try suits of such a nature, that the jurisdiction of the High Court has been completely excluded and a litigant has not even the right to come in appeal to the High Court, and that for the first time the Court of Small Causes has been constituted a Court of Appeal in landlord and tenant suits. All this may be very valid criticism against this legislation which we are considering, but a Legislature which is sovereign is not bound to exercise its power with discretion, and it is not for the Court to consider the wisdom, the expediency or the policy of the legislation that it may enact. The only question that the Court has to consider is whether the legislation is within the legislative competency of the Legislature.

[7] It is contended that the Provincial Legislature cannot in any way affect the provisions of the Government of India Act, 1935, and that the legislation we are considering has affected ss. 224 and 225 of that Act. Section 224 confers the power of superintendence upon the High Court over all Courts subject to its appellate jurisdiction. It then enumerates the various things that the High Court can do in the exercise of such power and sub-cl. (2) provides that "nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

There was a similar provision in the High Courts Act of 1861, s. 15, and the Government of India Act, 1915, s. 107. Section 224 has been enacted with three alterations in s. 15, High Courts Act and s. 107, Government of India Act, 1915. These three alterations are that the marginal note in s. 107 which was "Powers of High Courts with respect to subordinate Courts" has been altered to "Administrative functions of High Courts," that sub-cl. (b) in s. 107 which referred to "the power of the High Court to transfer any suit or appeal" has been omitted, and sub-cl. (2) has been added to the section. The view taken by this High Court before the section was amended and enacted in its new form in the Government of India Act, 1935, was that it gave the power to this Court of judicial interference. A Special Bench consisting of Sir John Beaumont, C. J., Broomfield and Nanavati JJ., were considering the powers of the Special Courts in *Emperor v. Balkrishna Phansalkar*, 34 Bom. L. R. 1523 : (A. I. R. (20) 1933 Bom. 1 : 34 Cr. L. J. 199 S. B.), set up by the Emergency Powers Ordinance passed by the Governor-General, and the question that arose was whether this Court had the power to entertain a revisional application from an order of the Special Court, and the Court held that as the right of appeal was provided in certain cases from the Special Courts, these Courts were under the superintendence of the High Court and the High Court had the power to interfere judicially under s. 107, Government of India Act. Sir John Beaumont says (p. 1545) :

"Under S. 107 the High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction. It is not disputed that rights of superintendence include not only superintendence on administrative points, but superintendence on the judicial side too, and that under its power of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction."

[8] In *Emperor v. Jamnadas Nathji*, 39 Bom. L. R. 82 : (A. I. R. (24) 1937 Bom. 153 : 38 Cr. L. J. 606) Broomfield and Sen JJ. invoked their jurisdiction under s. 107 to reverse a conviction which was wrong on the face of it. In that case a party who could have appealed had not appealed and therefore no application by him in revision could be entertained by the High Court. But in order to prevent an obvious miscarriage of justice the Court interfered.

[9] It is contended by the Advocate-General that whatever the position might have been prior to the Government of India Act, 1935, the position now is that s. 224 is confined to the administrative functions of High Courts and does not give them any right of judicial interference. Attention in the first place is drawn to the marginal note, then it is pointed out that the

power of the High Court to transfer suits and appeals has been advisedly omitted and a new sub-s. (2) is added which precludes the High Court from questioning any judgment of any inferior Court which is not otherwise subject to appeal or revision.

[10] With regard to the marginal note, it is clear that it cannot control the construction of the section if the words used are clear and unambiguous. With regard to the omission of the power to transfer suits and appeals, it was obviously unnecessary to embody that power in this section, because that finds an appropriate place both in the Letters Patent and in the Procedure Codes. The prohibition under sub-s. (2) only refers to those judgments of an inferior Court which are not otherwise subject to appeal or revision to the High Court. But the prohibition cannot and does not apply to judgments which are subject to appeal or revision. If S. 224 (1) gave the High Court the power of judicial interference, that power obviously has not been wholly taken away, but it has been taken away to the extent of those judgments which are not subject to appeal or revision. In other words, if a judgment is subject to appeal or revision, it seems that the High Court would still have the power to interfere judicially apart from and over and above merely dealing with those judgments in appeal or revision. But for such a power the High Court could not have interfered in the case to which I have just referred, *Emperor v. Jamnadas Nathji*, (39 Bom. L. R. 82 : A. I. R. (24) 1937 Bom 153 : 38 Cr. L. J. 606). Mr. Seervai has contended that the prohibition in sub-s. (2) refers to judgments of inferior Courts which are not subject to the appellate or revisional jurisdiction of the High Court. According to him if a Court is subject to such a jurisdiction, then the powers of the High Court under sub-s. (1) are not affected. It is impossible to accept that contention. It is true that the pronoun "which" appearing immediately after "inferior Court" should ordinarily qualify that noun and not the noun "judgment" which comes before it. But a Court cannot be subject to appeal or revision, it is only a judgment which can be so subject, and therefore looking to the plain grammatical construction of sub-s. (2) "which" qualifies "judgment" and not "inferior Court" the prohibition refers to "judgment" and not to an "inferior Court."

[11] The Advocate-General has referred us to several cases which have taken the view that S. 224 as enacted has completely taken away the judicial powers of the High Court. Abdur Rahman J. of the Madras High Court in *In re Adiraju Somanna*, (1938) 1 F. L. J. 81 : (A. I. R. (25) 1938 Mad. 634) took the view that the power of

the High Court to revise orders was taken away by the amendment of S. 107, Government of India Act. The Lahore High Court in *Amar Singh v. Secy. of State*, A. I. R. (25) 1938 Lah. 442 : (178 I. C. 292), the Nagpur High Court in *Dattatraya v. Registrar, Co-op. Societies*, A. I. R. (21) 1941 Nag. 282 : (I. L. R. 1941 Nag. 397) and *Dattatraya v. Emperor*, A. I. R. (31) 1944 Nag. 286 : (46 Cr. L. J. 598) and the Patna High Court in *Bhutnath Khawas v. Dasrathi Das*, A. I. R. (28) 1941 Pat. 544 : (42 Cr. L. J. 546), took the same view. But with great respect to those High Courts and the Judges who decided the cases, they have merely made a passing reference to this section and have not given a considered decision as to what is the effect of amending S. 107 in the manner in which it has been amended. Lokur J. also considered this question in *Muljee Sicka & Co. v. Municipal Commissioner*, 41 Bom. L. R. 984 : (A. I. R. (26) 1939 Bom. 471). He was there considering along with Macklin J. the power of the High Court to issue a writ of *certiorari*. With very great respect to the learned Judge, after saying in his judgment at p. 988 that sub-s. (2) could not have been intended to curtail any of the powers possessed by the High Court before the Act of 1935 was passed, goes on to observe that S. 224 now deals merely with the administrative functions of the High Court as the marginal note shows. The marginal note was permitted to play a more important and significant part by the learned Judge than it has any right to do. I might also mention that cl. 15, Letters Patent excludes from the judgments of a single Judge which are made subject to appeal under that clause a sentence or order passed or made in the exercise of the power of superintendence under the provisions of S. 107, Government of India Act. That seems to make it clear beyond any doubt that S. 107 conferred revisional jurisdiction upon the High Court in exercise of which it could pass a sentence or an order. But assuming that the High Court has still got the power of judicial interference under S. 224, in the view I have taken as to the effect of ss. 28, 29 and 50, these sections do not in any way affect that power.

[12] It has also been argued that S. 49 (2) (iii) gives the power to the Provincial Government to make rules with regard to the procedure to be followed in trying or hearing suits, proceedings (including proceedings for execution of decrees and distress warrants), applications, appeals and execution of orders, and that impinges upon the power of the High Court under S. 224 (1) (b) to make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts. But this power of the High Court is subject to an important

proviso that such rules, forms and tables shall not be inconsistent with the provisions of any law for the time being in force, and shall require the previous approval of the Governor. Therefore, the very proviso contemplates any competent law providing for these very matters and the power of the High Court is only to make rules which are not inconsistent with any law for the time being in force, and therefore it is perfectly competent to the Provincial Legislature to make rules regulating the procedure of suits to be filed under the Act.

[13] It is next argued that the impugned sections affect the power of the High Court under S. 225 to transfer a case to itself for trial which involves the questions of the validity of any Federal or Provincial Act. An order under S. 225 can only be made on the application of the Advocate-General for the Province in relation to a Provincial Act. The High Court can only exercise this power provided it has the power to transfer the particular case to itself for trial. As I have pointed out already, the power of the High Court to transfer cases to itself under cl. 13, Letters Patent remains unaffected and, therefore, the power of the High Court under S. 225 has not been in any sense taken away by the impugned legislation.

[14] The interesting question was also debated at the Bar whether the Provincial Legislature has now the power to affect a section of the Government of India Act. It is unnecessary to decide that question, but I shall only notice it in passing. It was contended on the one hand by the Advocate-General that S. 110 which prohibited the Central or the Provincial Legislature from making any law amending any provision of the Government of India Act has been omitted when the Government of India Act, 1935, was adapted under the Independence Act. Section 223 is also relied upon by him as enabling the Provincial Legislature to legislate with regard to the jurisdiction of the High Court in respect of those subjects about which it is competent to legislate. On the other hand, Mr. Seervai has relied on S. 99 of the Act which entitles the Provincial Legislature to make laws for the Province or any part thereof only subject to the provisions of that Act, and it is argued that ss. 224 and 225 constitute the provisions of the Act which the Provincial Legislature cannot affect or modify. It is also argued that the Provincial Legislature being the creature of the Constitution Act cannot amend or modify the Constitution Act itself, and attention is drawn to the fact that under the Independence Act power is expressly given to the Central Legislature when sitting as Constituent Assembly to modify or amend the Government of India Act,

1935, and no such power is given to the Provincial Legislature. Interesting as these questions are, it is unnecessary further to deal with them in view of our decision that neither S. 224 nor S. 225 is in any way affected or modified by the Provincial Legislature.

[15] It is common ground that the legislation we are considering does affect the powers and jurisdiction of the High Court under the Letters Patent, and the question that arises is whether the provisions of the Letters Patent are subject to the legislative powers of the Provincial Legislature. Under cl. 44 they are made expressly subject to the legislative powers of and may be in all respects amended and altered by the Governor-General in Legislative Council and also by the Governor-General in Council under S. 71, Government of India Act, 1915, and also by the Governor-General in cases of emergency under S. 72 of that Act. Mr. Seervai's contention is that even now after the passing of the Government of India Act, 1935, it is only the Central Legislature that can amend or alter the Letters Patent. Section 292, Government of India Act, 1935, provided that the existing law of India was to continue in force until altered or repealed or amended by a competent Legislature or other competent authority, and S. 293 provided for the adaptation of existing Indian laws. Both ss. 292 and 293 have been omitted from the Government of India Act as adapted, but S. 18 (3), Independence Act contains provisions similar to S. 292. But under S. 292 an Order was made known as the "Government of India (Adaptation of Indian Laws)" and cl. 7 of that Order provided that any reference by whatever form of words in any Indian law in force immediately before the commencement of that Order to an authority competent at the date of the passing of that law to exercise any powers or authorities, or discharge any functions, in any part of British India shall, where a corresponding new authority has been constituted by or under any part of the Government of India Act, 1935, have effect as if it were a reference to that new authority. Section 293 was not made applicable to an Act of Parliament and the expression "any law in force in British India" was defined as including any Ordinance, by-law or rule or regulation having in British India the force of law. The Letters Patent are not an Act of Parliament. They were issued pursuant to an Act of Parliament and it is clear they were the law in force in British India both when S. 293 was enacted and the Order-in-Council to which I have just referred was passed. Therefore, the position is clear that although cl. 44 permitted only the Central Legislature to amend the Letters Patent after the passing of the Government of India Act, 1935, it

was the appropriate Legislature which was given that power and under the Government of India Act, 1935, the only appropriate Legislature which can modify or alter the Letters Patent is the Provincial Legislature with regard to those matters which fall within its competence, and if the matter is tenancy legislation, then the jurisdiction of the High Court can only be affected by the Provincial Legislature. The same view of the powers of the Provincial Legislature has been taken by Sir Leonard Stone and Kania J. in *Hirji Laxmidas v. Fernandez*, 47 Bom. L. R. 294 : (A. I. R. (32) 1945 Bom. 352).

[16] The next point that is urged is that the impugned legislation excludes the jurisdiction of the Federal Court which it is not competent to the Provincial Legislature to do. The argument briefly stated is that suits between a landlord and tenant which were filed in the High Court could go in appeal to the appellate division of the High Court and from there in appropriate cases an appeal would lie to His Majesty in Council. Under Act I [1] of 1948, appellate jurisdiction has been conferred upon the Federal Court and appeals which lay to His Majesty in Council now lie to the Federal Court, and the contention is that inasmuch as a litigant will not be able to file the suit in the High Court at all with regard to matters falling under Act LVII [57] of 1947, he would also be deprived of his ultimate right to go in appeal to the Federal Court. In order to appreciate this argument, it is necessary to consider what the jurisdiction of the Federal Court is. Under S. 204, Government of India Act it has been given certain original jurisdiction. Under S. 205 it is given appellate jurisdiction in appeals from High Courts. That jurisdiction is confined to cases where the High Court certifies that a case involves a substantial question of law as to the interpretation of the Government of India Act or any Order in Council made thereunder. Under S. 206, power is given to the Central Legislature to enlarge its appellate jurisdiction by providing that appeals shall lie in such civil cases as may be specified from a judgment, decree or final order of a High Court and it is under the power given to it under S. 206 that the Central Legislature passed Act I [1] of 1948 and this Act provides that appeals would lie to the Federal Court from any judgment, decree or final order of a High Court in a civil case from which a direct appeal could have been brought to His Majesty in Council. Therefore, the jurisdiction of the Federal Court, whether under S. 205 or S. 206, arises only on a judgment, decree or final order being passed by the High Court and it cannot possibly be suggested that Act LVII [57] of 1947 excludes any appeal to the Federal Court from a decision of the High Court.

[17] But it is argued that with regard to the pending suits which are sought to be transferred under S. 50, the litigant had a vested right of appeal to the Federal Court and in taking away that right, the jurisdiction of the Federal Court is excluded. It is a well-established principle of law that no litigant has any right to have his litigation decided by any particular procedure and all procedural laws are therefore retrospective in their character and affect even suits filed prior to the passing of such legislation. But a right of appeal which a suitor has in a pending action is not merely a matter of procedure. It is a vested right and the Legislature cannot take away that right retrospectively unless it does so by express words or necessary intendment. In *Colonial Sugar Refining Company v. Irving*, (1905) A. C. 369 : (74 L. J. P. C. 77) the right of appeal from the Supreme Court of Queensland to His Majesty in Council was taken away by the Australian Commonwealth Judiciary Act, 1903. That Act received the Royal assent on 25th August 1903, and the writ in a particular action was issued in the Queensland Court on 25th October 1902. On 4th September 1904, the Supreme Court of Queensland decided the action and the question that arose was whether by the Australian Commonwealth Judiciary Act the losing party had lost his right to appeal to His Majesty in Council and the Privy Council held that the Australian Judiciary Act did not have retrospective effect and the right of that litigant to appeal to the Privy Council was not taken away. It is to be noted that the Privy Council conceded that such a right could have been taken away if a clear intention to that effect had been manifested in the legislation itself.

[18] A special Bench of the Calcutta High Court in *Sadar Ali v. Dalimuddin*, 56 Cal 512 : (A. I. R. (15) 1928 Cal. 640 (F.B.)) considered the effect of the amendment of the Letters Patent of the Calcutta High Court in 1927, which came into effect on 14th January 1928, whereby it was provided that there was no right of appeal from the decision of a single Judge sitting in second appeal in the absence of a certificate from him, that the case was a fit one for appeal, and the Court held that the date of presentation of a second appeal to the High Court was not the date which determined the applicability of the amended clause of the Letters Patent; the relevant date was the date of the institution of the suit from which the appeal arose. Rankin C. J. took the view that the right of appeal arises at the date of the suit and that the litigant had the right to take the matter to the final Court of appeal in due course of existing law and that suits and appeals are all steps in the legal

pursuit of a remedy connected by an intrinsic unity. But in this case there can be no question that by S. 50 the Legislature has in terms taken away the right of those litigants whose suits are pending in the High Court of appeal to the High Court itself and perhaps ultimately to the Federal Court. The only question that can arise, therefore, is whether it was open to the Provincial Legislature to deprive a litigant of his vested right to appeal to the Federal Court.

[19] Mr. Seervai argues that to deprive a litigant of his right to appeal to the Federal Court is interfering with the jurisdiction of the Federal Court, because to the extent that the right of appeal to the Federal Court is taken away, the Federal Court does not have the jurisdiction to deal with those appeals. There can be no doubt that if Mr. Seervai is right, if the jurisdiction of the Federal Court is interfered with, then the Provincial Legislature is certainly not competent to pass any such legislation. But this very question arose before the Federal Court in *Emperor v. Benoari Lall*, A. I. R. (30) 1943 F. C. 36 : (45 Cr. L. J. 1). It was argued before Varadachariar C. J. and Zafrulla Khan and Rowland JJ. that Ordinance II [2] of 1942 was beyond the power of the Indian Legislature inasmuch as it affected the jurisdiction of the Federal Court in so far as it took away the appellate and revisional jurisdiction of the High Court. The answer given by the Federal Court to that argument was that all that the Constitution Act declared about the jurisdiction of the Federal Court was that appeals should lie to that Court from the decisions of the High Court. Such a provision did not admit of the interpretation that the jurisdiction of the High Court should never be affected by Indian legislation because the indirect effect thereof might be to affect the number or classes of cases which might otherwise come up before the High Court and thus afford a possibility of their being carried on appeal to the Federal Court. This is exactly the argument now advanced before us by Mr. Seervai. He says that the indirect effect of this legislation is to affect the number or classes of cases which would otherwise have come up to the High Court and thereby the number of appeals that might go to the Federal Court has also been affected. Mr. Seervai has tried to distinguish this case by urging that the Court was not considering pending cases but cases which might be filed, and Mr. Seervai says that there is a vital distinction between the two, because in the case of a pending litigation there is a vested right of appeal whereas there is no such vested right in the case of a suitor who is deprived of his right of appeal before he has filed his suit. But that distinction only emphasises the point as to the

retrospective nature of the legislation. It does not detract from the decision of the Federal Court as to the competence of the Legislature to pass laws which indirectly affect appeals going up to Federal Court. The Provincial Legislature has the competence and when the Court considers the legislation it has passed, it has got to determine whether the legislation is retrospective or not in its character. If it is retrospective, then it affects even the vested rights of litigants to appeal to the Federal Court. If it is not retrospective in its nature, then although it may affect future litigation, it cannot affect suits which are already pending; and I might point out that in the case before Federal Court S. 5 of Ordinance II [2] of 1942 gave power to the Provincial Government to direct what cases should be tried by Special Judges and those included cases which were pending in the ordinary criminal Courts, and though the point was not expressly argued, in considering the question of *ultra vires* the Federal Court did have before it the provision of the Ordinance which would make it possible for the Provincial Government to transfer pending cases and notwithstanding that the Federal Court came to the conclusion that the legislation was *intra vires*.

[20] The last argument advanced by Mr. Seervai is that the effect of this legislation is to constitute a serious encroachment on the rights and powers of the High Court with the result that the High Court would cease to occupy that position which the Government of India Act designed it should fill. It is pointed out that before the Independence Act was passed, in the Instrument of Instructions to Governors and the Governor-General it was specially provided that they should not assent to any bill which, if it became law, would so derogate from the powers of the High Court as to endanger the position in which that Court was by the Act designed to fill. It is contended that the High Court as much as the Federal Court is an essential and fundamental feature of the constitution of the country and it can never be competent to the Provincial Legislature to undermine the integrity and authority of the High Court. Mr. Seervai says that the attempt of the Provincial Legislature is gradually to deprive the High Court of its original jurisdiction in respect of various classes of cases so that ultimately its powers should become truncated and its prestige should disappear. Mr. Seervai has relied on a decision of the Privy Council in *Attorney-General for Alberta v. Attorney-General for Canada*, (1939) A. C. 117 : (A. I. R. (26) 1939 P. C. 53). In that case the Privy Council had to consider the conflicting claims of the Dominion and Provincial Legislature to legislate in Canada with regard

to a particular subject. Banking was a Central subject and taxation for the purpose of raising of a revenue for Provincial purposes was within the exclusive competence of the Provincial Legislature. The Provincial Legislature passed an Act which although on the face of it purported to raise revenue by taxing banks, its effect was practically to destroy banking institutions by taxing them out of existence, and the Privy Council held that the bill was merely part of a legislative plan to prevent the operation within the Province of banking institutions which had been called into existence and given the necessary powers to conduct their business by the only proper authority, viz., the Parliament of the Dominion. Mr. Seervai says that here also there is a plan to take away gradually the powers and jurisdiction of the High Court and Mr. Seervai wants us to consider other pieces of legislation passed by the Provincial Legislature or which it intends to pass affecting the jurisdiction of this Court. I am afraid Mr. Seervai is taking too gloomy a view of the whole matter. Merely to pass a law with regard to tenancy legislation and to confer jurisdiction upon certain Courts and take away the jurisdiction of the High Court is not something so outrageous as to call for this criticism especially when, as we have held, the High Court continues to retain its power and jurisdiction unimpaired and unaffected to exercise its revisional power and also its extraordinary original jurisdiction. As I said before, it would be wholly wrong for the Court to go into questions of policy. Whether it is right or wrong for the Legislature to confer such vast powers upon a Court of summary jurisdiction is entirely a matter for Government and for the Legislature. We are only concerned with the legislative competence of the Provincial Legislature. Whether the Legislature has acted wisely or not is a question which is not within our competence to consider and decide. In my opinion, therefore, the impugned sections are not *ultra vires* of the Provincial Legislature.

[21] I would answer the three preliminary issues as follows:—No. 1 in the negative. No. 2 given up, and No. 3 in the negative. This suit will therefore be transferred to the Small Cause Court under s. 50 of the Act. No order as to costs of the hearing before us. Certificate granted under s. 205, Government of India Act

[22] **Tendolkar J.** — This is a suit filed by a tenant against a sub tenant for ejectment and other reliefs. The suit was actually filed before the Bombay Rents, Hotel and Lodging House Rates (Control) Act (Bombay LVII 57) of 1947) became law on January 19, 1948; but when it came on for hearing, the position under the proviso to s. 50 of that Act was that all pending

suits must be transferred to the Court of Small Causes at Bombay. Neither the plaintiff nor the defendant desires that this case should be so transferred; and they, therefore, challenge the validity of the said Act on the ground that certain provisions thereof are *ultra vires* the local Legislature. Upon this plea Desai J., before whom the matter came up in the first instance, directed that the Province of Bombay should be made a party defendant in the suit in order that the question of the validity of this Act may be determined in this suit. As the question involved was of considerable importance, the learned Chief Justice directed that the suit should be tried by a Division Bench, and it has accordingly come up before us.

[23] At the trial of this suit three issues were raised on behalf of the Province of Bombay by the Advocate General. They are as follows:

- "1. Whether ss. 28, 29 and 50 of Bombay Act LVII [57] of 1947 are *ultra vires* the Provincial Legislature?
2. Whether the said sections are repugnant to existing law and void and of no effect, and if so, to what extent?
3. Whether this Honourable Court has jurisdiction to try this suit?"

We decided to try these issues as preliminary issues: The argument before us has been restricted to the first issue; and it has not been suggested that the provisions of Act LVII [57] of 1947 are in any way repugnant to existing law although that is the second issue. Mr. Seervai for the plaintiff has submitted before us that Act LVII [57] of 1947 is beyond the powers of the local Legislature as it affects, (1) the jurisdiction of the High Court under s. 224, Government of India Act, 1935; (2) the jurisdiction of the High Court under s. 225 of the said Act; (3) the jurisdiction of the Federal Court; and (4) the jurisdiction of the High Court under the Letters Patent. Before proceeding to consider these objections, I may state that the Act which has been challenged is admittedly within the scope of the legislative authority of the local Legislature. The Act seeks to amend and consolidate the law relating to control of rents and repairs of certain premises, rates of hotels and lodging houses and eviction. In that regard it prescribes the powers of the Courts and makes provisions for the procedure to be followed by these Courts. The persons affected by this legislation are landlords and tenants. The Act is covered by items 2 and 21 in the Provincial Legislative List, being Part II in the seventh schedule to the Government of India Act. Item 2 deals with the jurisdiction and powers of all Courts except the Federal Court with respect to any of the matters in the said list and item 21 deals with land including relations of landlord and tenant and collection of rents. So far as the Act deals with procedure, that is covered by items 4 and 15

in the Concurrent Legislative List being Part III in the said schedule. These provisions in the Government of India Act have been preserved by S. 8, Indian Independence Act, 1947.

[24] Taking the objections in the order in which Mr. Seervai has raised them, we have first to consider what are the powers of the High Court under S. 224, Government of India Act. It is contended by Mr. Seervai that these powers include a power of judicial superintendence, while, on the other hand, it is contended by the Advocate-General that the powers conferred on the High Court by this section are administrative only.

[25] In order to determine which of these two contentions is correct, it is necessary to refer to prior legislation. Section 224, Government of India Act, 1935, takes the place of S. 107 of the earlier Government of India Act, 1915. The powers conferred upon the High Court by S. 107 of that Act undoubtedly included powers of judicial correction as is apparent from a reference to cl. 15 of the Letters Patent, which refers to "sentence or order passed in the exercise of the powers of superintendence under the provisions of S. 107." Section 107 was considered by a Special Bench of this Court consisting of Beaumont C. J. and Broomfield and Nanavati JJ. in *Emperor v. Balkrishna Phansalkar*, 34 Bom. L. R. 1523 : (A.I.R. (20) 1933 Bom. 1 : 34 Cr. L. J. 199 (S.B.)) which was a case under the Emergency Powers Ordinance (Ordinance II [2] of 1932). There were Special Courts established under that Ordinance and rights of appeal from the judgments of such Courts were conferred on the High Court only in a limited class of cases. The question for decision was whether in respect of other judgments of these Special Courts, they were subject to judicial correction by the High Court under S. 107. Dealing with this question Beaumont C. J. observed (p. 1545) :

"It is not disputed that rights of superintendence include not only superintendence on administrative points, but superintendence on the judicial side too, and that under its powers of superintendence the High Court can correct any error in a judgment of a Court subject to its appellate jurisdiction."

The learned Chief Justice then proceeded to hold that the Special Courts were subject to the appellate jurisdiction of the High Court because the High Court had power to hear appeals in some cases from these Courts, and that, if there was a right of appeal in any case, the Court from whose judgments such right of appeal was allowed was subject to the superintendence of the High Court in respect of all cases and not only in respect of cases in which a right of appeal was specifically granted. This judgment of the Special Bench was followed by a Division Bench of this Court in *Emperor v. Jamna-*

das Nathji, 39 Bom. L. R. 82 : (A.I.R. (24) 1937 Bom 153 : 38 Cr. L. J. 606). The facts of that case were somewhat peculiar. Several people had been convicted of an offence under the Prevention of Gambling Act. Some of these persons filed an appeal and were acquitted. Those who had not appealed thereupon presented a revision application which could not be entertained under S. 439(5), Criminal P. C., because they had not chosen to appeal. The question was whether the High Court had jurisdiction to acquit them. Broomfield and Sen JJ. held that it had such jurisdiction under S. 107 and acquitted them although there was no appeal or revision application by them, as the High Court considered that the conviction was wrong on the face of it and that the ends of justice demanded their acquittal. There is no doubt, therefore, that S. 107 conferred upon the High Court a power of judicial superintendence, including of course a power of judicial correction, and, so far as the decisions of this Court went, that power could also be exercised in cases where there was no right of appeal or revision to the High Court, provided the case was tried by a Court which was subject to the appellate jurisdiction of the High Court.

[26] The question that we have to consider next is whether S. 224, Government of India Act has made any difference to the law. Section 224 differs from S. 107 in three respects; firstly cl. (b) of S. 107 has been omitted from S. 224; secondly, the marginal note to S. 107 which was "powers of High Court with respect to subordinate Courts" has been altered to "Administrative Functions of High Courts;" and, lastly, a new sub-section, sub-S. (2) has been introduced in S. 224.

[27] I will now proceed to consider the effect of these alterations on the law as it stood under S. 107, Government of India Act. The deletion of cl. (b) of S. 107 to my mind makes no difference to the law. That clause empowered the High Court to transfer cases from one Court to another. Quite obviously, it was omitted because it was wholly redundant having regard to the fact that powers of transfer were conferred on the High Courts by the Codes of Civil and Criminal Procedure. Then, again, the change in the marginal note cannot, in my opinion, effect any change in the meaning to be given to the section, for it is clear law that a marginal note in an Act of Parliament does not control the meaning of the section. That brings me to sub-s. (2) of S. 224 which is in these terms:

"(2) Nothing in this section shall be construed as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

It is contended by Mr. Seervai that the word "which" qualifies "Court" and not "judgment." That contention to my mind is wholly untenable. I have never heard of a Court being subject to appeal or revision. It is only the judgment or order of a Court that can be subject to appeal or revision. In my opinion the word "which" qualifies "judgment," and this sub-section excludes superintendence of the High Courts in respect of judgments which are not subject to appeal or revision; but it does not affect the superintendence of the High Courts in respect of judgments which are subject to appeal or revision.

[28] The Advocate-General has contended that this sub-section deprives the High Court of all powers of judicial superintendence. I cannot accept that contention. The sub-section in terms seeks to take away from the operation of sub-s. (1) certain classes of judgments. That in itself, to my mind, shows that but for this sub-section there would have been judgments which could be questioned by the High Court under its power of superintendence. Sub-section (1) is identical in terms with S. 107, Government of India Act, 1915, except of course with regard to the deletion of cl. (b) of S. 107, and in my opinion sub-s. (1) includes the power which existed under S. 107, Government of India Act, 1915, of judicial superintendence and correction. By reason of sub-s. (2) that power is taken away only with regard to judgments which are not subject to appeal or revision.

[29] This section has come up for discussion in certain decisions of High Courts in India. The first of such cases is *In re Adiraju Somanna*, (1938) 1 F. L. J. 81 : (A. I. R. (25) 1938 Mad. 634). That was a case of a petition for revision against an order passed by the District Judge of East Godawari declaring the petitioner to be a tout under the Legal Practitioners Act. It was contended that the order was not open to revision by reason of S. 224 (2), Government of India Act. Sir Abdul Rahman J. upheld the contention and observed:

"The amendment contained in the new Government of India Act makes it clear that the High Court would not be entitled to revise the order in question under S. 224 of the Act, if it is not capable of being revised under any other provision of law."

I read this to mean that if the order is not subject to revision, the power of judicial superintendence of the Court is not applicable. We next have the decision of the Lahore High Court in *Amar Singh v. Secy. of State*, A. I. R. (25) 1938 Lah. 442 : (178 I. C. 292). In a very brief judgment Skemp J. states (p. 442):

"Section 224 (2) of the later Act limits High Court's powers to question judgments of inferior Courts to those given under the ordinary law."

With respect to the learned Judge I am unable to agree. The learned Judge has thought fit to give no reasons why he came to that conclusion; but as I have pointed out above, there is in the High Courts a power, outside the ordinary law, of judicial superintendence over decisions of inferior Courts, such power, for instance, as was exercised by this Court in *Emperor v. Jamnadas Nathji*, (39 Bom. L. R. 82 : A. I. R. (24) 1937 Bom. 153 : 38 Cr. L. J. 606). We next have a decision of the Nagpur High Court, *Dattatraya v. Registrar, Co op. Societies*, A. I. R. (28) 1941 Nag. 282 : (I. L. R. (1941) Nag. 397). In that case Niyogi J. held that the High Courts in India other than Chartered High Courts had no power to issue a writ of *certiorari*. In that connection the learned Judge considered the provisions of the Government of India Act regarding the jurisdiction of the High Courts, and in summarising his conclusions states (p. 287):

"Section 224 (2), Government of India Act, denies to the High Courts jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

The next decision is *Bhutnath v. Dasarathi Das*, A. I. R. (28) 1941 Pat. 544 : (42 Cr. L. J. 546). The actual question decided in that case was that the High Court has no jurisdiction to expunge objectionable remarks from the judgment of an inferior Court when that judgment is not before the High Court to be dealt with on the merits. Dhavle J. in his order makes a passing reference to S. 224 in these words (p. 546):

".... but the latest Government of India Act makes it perfectly clear that the superintendence given to the High Court under sub-s. (1) of S. 224 of the Act is not to be construed, see sub-s. (2), as giving to a High Court any jurisdiction to question any judgment of any inferior Court which is not otherwise subject to appeal or revision."

With respect, I entirely agree with this observation. We next have the case of *Dattatraya v. Emperor*, A. I. R. (31) 1944 Nag. 286 : (46 Cr. L. J. 598). It was decided by a Division Bench consisting of Pollock and Bobde JJ. It was a *habeas corpus* application under S. 491, Criminal P. C. and the Court held that that section did not apply. Section 224, Government of India Act was also invoked, and in passing the order the learned Judges dealt with this part of the case and stated (p. 287):

"But that section does not add to the appellate or revisional powers of the High Court as has been expressly stated in its sub-s. (2). So whatever appellate or revisional powers the High Court possesses have to be sought elsewhere."

With respect, I am unable to agree with these observations. We next have certain observations of Lokur J. in the case of *Mulji Sicka & Co. v. Municipal Commissioner*, 41 Bom. L. R. 984 : (A. I. R. (26) 1939 Bom. 471). That was a case dealing with a writ of *certiorari* where the

question as to whether the powers of judicial superintendence were preserved by S. 224, Government of India Act, 1935, did not directly arise for decision. After setting out S. 224 (2) in his judgment Lokur J. observed as follows (p. 988):

"This clause cannot have been intended to curtail any of the powers possessed by the High Courts before the Act of 1935 was passed. In fact S. 223 preserves those powers. All that sub-s. (2) of S. 224 means is that the High Courts cannot so interpret sub-s. (1) of that section as to usurp the powers which they did not possess before. This is clear from the expression 'not otherwise subject to appeal or revision.' It is true that this clause may throw some doubt as to whether the remarks made in *Sholapur Municipality v. Tuljaram Krishnasa*, (A. I. R. (18) 1931 Bom. 582 : 55 Bom. 544) that though an order of a subordinate Court may not be subject to revision under S. 115, Civil P. C., it can be revised in the exercise of the powers of superintendence conferred by S. 107, Government of India Act of 1915, can now hold good. All this discussion is more or less academical, since S. 224, Government of India Act of 1935 deals with the administrative functions of High Courts, as the marginal note shows."

With respect to the learned Judge, I am unable to find what the learned Judge considered to be the true interpretation of S. 224 (2). The opening words of the above quotation indicate that the learned Judge thought that the powers which the High Court had before the Act of 1935 were not in any respect curtailed. If that is so, then the powers were as found by the Special Bench in *Emperor v. Balkrishna Phansalkar*, (34 Bom. L. R. 1523 : A. I. R. (20) 1933 Bom. 1 : 34 Cr. L. J. 199 (S.B.)). These certainly were not purely administrative powers. But the learned Judge ends by saying that S. 224 deals with administrative functions only. Again in doing so, the learned Judge relies on the marginal note to the section as authority for that proposition, which it is not open to a Court to do, because it is well-established law that the marginal note does not control the meaning of the section. With respect, I am unable to understand the force of the observation that sub-s. (2) merely means that the High Courts cannot so interpret sub-s. (1) of that section as to usurp the powers which they did not possess before. I should have thought that no Court has a right to usurp powers which it does not possess, and no legislative enactment is necessary to make such a provision. With respect, therefore, these observations of Lokur J. are not helpful to determine the true meaning to be placed on S. 224, Government of India Act. Lastly, we have another decision of a Division Bench of this Court, *Mithalal Ranchhdodas v. Manecklal Mohanlal*, 43 Bom. L. R. 480 : (A. I. R. (28) 1941 Bom. 271). That was an application under O. 21, R. 95, Civil P. C., by an auction purchaser to get possession of the property from the judgment-

debtor. The application had been rejected by the trial Court on the ground that it was time-barred. It was held that the High Court had no power to interfere in revision under S. 115, Civil P. C. In delivering judgment Broomfield J. at p. 482 casually observed : "under the present Government of India Act the High Court's power of superintendence does not extend to interference with judicial orders." With respect to the learned Judge, since he assigns no reasons for coming to that conclusion, I find myself unable to agree with that interpretation of S. 224.

[30] The result, therefore, is that, in my opinion, S. 224 still retains the jurisdiction of the High Court of judicial superintendence and correction, but such jurisdiction is excluded only in cases of judgments against which there is no appeal or revision. In my opinion, it would still be open to the High Court to interfere in a case similar to *Emperor v. Jamnadas Nathji*, (39 Bom. L. R. 82 : A. I. R. (24) 1937 Bom. 153 : 38 Cr. L. J. 606) unless no appeal or revision against the order of conviction was provided by law. In other words, where an appeal or revision against a judgment is permissible under the law, whether or not such an appeal or revision application is in fact filed, the High Court has power under S. 224 of judicial correction of such judgment.

[31] That being my view of the section, I have next to consider whether the provisions of Act LVII [57] of 1947 affect S. 224 in any manner. Section 28 of that Act deals with the jurisdiction of the Courts and states that the Court of Small Causes in Greater Bombay and the Court of a Civil Judge elsewhere

"shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions; and no other Court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question."

Now it is contended by Mr. Seervai that the words "deal with any claim or question arising out of this Act or any of its provisions" deprive the High Court of its power of judicial superintendence under S. 224. I am not prepared to read these words in that light or to give them such a wide meaning. It is a well-known canon of construction that in dealing with a statute which affects the jurisdiction of superior Courts the jurisdiction of such Courts shall not be excluded except by clear words to that effect. I read the words "deal with any claim or question arising out of this Act or any of its provisions" *ejusdem generis*. These words, in my opinion, only refer to the exercise of the

ordinary original civil jurisdiction and not to any other jurisdiction. I am strengthened in this opinion by the fact that the right of appeal is separately dealt with in S. 29. That section provides that from the decree or order of the Court of Small Causes an appeal shall lie to a Bench of two Judges of that Court and from a decree or order of the civil Judge to a District Judge; and that there shall be no further appeal. Section 28, therefore, to my mind, does not in the least affect the jurisdiction of the High Court under S. 224. Moreover, there is no provision in this Act which deprives the High Court of its power of revision; and therefore, in any event, the Court would have the right in a proper case to exercise its power of judicial superintendence in respect of all decrees and orders of the Court of Small Causes which under S. 6, Presidency-towns Small Causes Courts Act is subject to the superintendence of the High Court. The first objection of Mr. Seervai, therefore, fails.

[32] Mr. Seervai's next objection relates to S. 225, Government of India Act. Now that section provides for a transfer to the High Court of cases which involve or are likely to involve questions of the validity of legislation, in certain circumstances. Under that section the High Court can transfer to itself a case "which the High Court has power to transfer to itself for trial." Now, of course, S. 28 of the Act LVII [57] of 1947 undoubtedly prevents the High Court from trying any suit under that Act in its ordinary original civil jurisdiction; but I do not think that there is anything in Act (LVII [57] of 1947) to restrict the extraordinary original civil jurisdiction which the High Court enjoys under Cl. 13 of the Letters Patent. Under that clause the High Court has jurisdiction to transfer to itself for trial a case pending before any Court which is subject to its judicial superintendence. The Small Cause Court is one of such Courts; and I have no doubt, therefore, that the High Court has under its extraordinary original civil jurisdiction power to transfer to itself for trial a case pending before the Small Cause Court and arising out of Act (LVII [57] of 1947). If, therefore, there was any occasion for the application of S. 225, I have no doubt that S. 225 would apply; and there is nothing in Act LVII [57] of 1947 which affects the jurisdiction of this Court under S. 225.

[33] I next come to the third contention advanced by Mr. Seervai, namely, that Act LVII [57] of 1947 affects the jurisdiction of the Federal Court. The argument under this head is a somewhat ingenious one; and has been particularly stressed by Mr. Seervai. The argument is that the Act deprives the High Court of jurisdiction in cases falling within the scope of that Act and that, therefore, there is no possibility of

an appeal going up to the Federal Court in any of such cases. That, Mr. Seervai contends, affects the jurisdiction of the Federal Court. To my mind, this argument is entirely untenable. The appellate jurisdiction of the Federal Court is derived from Ss. 205 and 206, Government of India Act. Under S. 205 an appeal lies to that Court from a decision of the High Court when certain points regarding the interpretation of the Constitution are involved. Under S. 206 the Dominion Legislature is empowered to enlarge the appellate jurisdiction of the Federal Court and it has in fact proceeded to do so by enacting the Federal Court (Enlargement of Jurisdiction) Act 1947, being Act I [1] of 1948. Under that Act an appeal lies to the Federal Court from a judgment, decree or final order of a High Court in certain cases. It is apparent, therefore, that both under S. 205 and under Act I [1] of 1948 an appeal can lie to the Federal Court from a judgment, decree or a final order of the High Court. This right of appeal is in no way taken away by Act LVII [57] of 1947. In any case or class of cases, if the competent legislative authority provides that the High Court shall have no jurisdiction, then in respect of such case or class of cases there can be no decree, judgment or final order against which an appeal can lie to the Federal Court; and, therefore, no occasion arises for the exercise of the jurisdiction by the Federal Court. It is not a case of affecting the jurisdiction of that Court at all. That jurisdiction remains intact: the only effect of such a legislation is possibly to reduce the number of cases that may have gone up to the Federal Court but for such legislation.

[34] I am strengthened in my opinion by a decision of the Federal Court in *Emperor v. Benoari Lall*, A. I. R. (30) 1943 F. C. 36 : (45 Cr. L. J. 1). In that case, Ordinance II [2] of 1942 had established Special Criminal Courts and deprived the High Courts of jurisdiction in respect of cases tried by such Courts. Varadachariar C. J. and Zafrulla Khan J. held (Rowland J. dissenting) that the Ordinance was *ultra vires*. But, in dealing with an argument that the Ordinance was *ultra vires* on the ground that it affected the jurisdiction of the Federal Court inasmuch as the High Court had been deprived of jurisdiction and, therefore, no appeal could go up to the Federal Court, Varadachariar C. J. observed as follows (p. 42) :

"There is little force in this objection. All that the Constitution Act declares about the jurisdiction of the Federal Court is that appeals shall lie to that Court from the decisions of the High Court, when certain points are involved therein. Such a provision does not admit of the interpretation that the jurisdiction of the High Court should never be affected by Indian legislation because the indirect effect thereof might be to

affect the number or classes of cases which might otherwise come up before the High Court and thus afford a possibility of there being carried on appeal to the Federal Court. Under the express terms of S. 223, it is within the power of the Indian Legislature to alter the jurisdiction and powers of the High Court."

Rowland J. dissented from the judgment of the majority on the main issue but he also took the same view with regard to this particular argument. The case went up to the Privy Council where it was held that the Ordinance was valid; but the argument that it was *ultra vires* by reason of the fact that it affected the jurisdiction of the Federal Court was apparently considered to be so untenable that it was not even mentioned before their Lordships.

[35] It is true that the jurisdiction of the Federal Court has been extended since that judgment was given; but it has not been suggested that this makes any difference to the position.

[36] Mr. Seervai has attempted to distinguish this judgment by submitting that although this may be good law in respect of legal proceedings that have not commenced, it is not good law with regard to pending litigation. He contends that every litigant has a vested right to pursue his remedy in all its stages including the right of appeal to the High Court and to the Federal Court, if any, and that if he is deprived of such right, it affects the jurisdiction of the High Court and the Federal Court, as the case may be.

[37] Now, there is no doubt that S. 50 of Act LVII [57] of 1947 provides for a transfer of all suits pending before the High Court to the Court of Small Causes; and in such suits there can be no appeal to the High Court by reason of S. 29, with the result that there is no possibility of an appeal to the Federal Court in any of such cases. Equally, there is no doubt that once legal proceedings are commenced the litigant has a vested right to have them decided in the manner then provided by law, which includes all rights of appeal that he may have had under the law as it then stood. This proposition is borne out by the cases relied on by Mr. Seervai, viz., *The Colonial Sugar Refining Co. v. Irving* (1905) A. O. 369 : (74 L. J. P. C. 77) and *Sadar Ali v. Dalimuddin*, 56 Cal. 512 : (A. I. R. (15) 1928 Cal. 640 (F. B.)). But it is clear law that vested rights can be taken away by the express words of a statute. In this case the proviso to S. 50 of Act LVII [57] of 1947, which provides for the transfer of pending suits to the Court of Small Causes, concludes with the following words :

"And thereupon all the provisions of this Act and the rules made thereunder shall apply to all such suits and proceedings."

In a judgment delivered by me on 23rd February in *Suleman Haji Ahmed Omar v. R. J. Patel*,

O. C. J. Suit No. 2313 of 1946, decided on 23rd February 1948, I have held that by reason of this part of the proviso vested rights, if any, have been retrospectively affected; and there is no question that under the new Act there will be no right of appeal to the High Court.

[38] Depriving litigants of their right to go to the Federal Court in a possible contingency is not to my mind depriving the Federal Court of jurisdiction in any sense of the word. Jurisdiction of the Court and the right of the litigant to resort to it are, in my opinion, two distinct matters. I do not think that the jurisdiction of the Federal Court is in any manner affected, because the litigants in pending suits have been deprived of their right to go to the Federal Court in possible contingency. This argument of Mr. Seervai must also, therefore, fail.

[39] The last submission of Mr. Seervai is that Act LVII [57] of 1947 affects the jurisdiction conferred upon the High Court by the Letters Patent. That it does so is not disputed. But the Advocate General contends, and, in my opinion rightly, that the local Legislature has jurisdiction to amend the Letters Patent or to alter it. This view was accepted by a Division Bench of this Court consisting of Stone C. J. and Kania J. (as he then was) in *Hirji Laxmidas v. Fernandes*, 47 Bom. L. R. 294 : (A. I. R. (32) 1945 Bom. 352). Their Lordships there held that by the conjoint effect of S. 293, Government of India Act, 1935, and ss. 2 and 7, Government of India (Adaptation of Indian Laws) Order, 1937, the reference to the Governor-General-in-Council in cl. 44 of the Letters Patent also refers to all other competent authorities, and that, therefore, the Letters Patent could be altered not only by the Central Government, but also by the Provincial Legislatures. I respectfully follow that decision and can usefully add nothing whatever to it. It is true that subsequent to this decision S. 293, Government of India Act, 1935, has been omitted from that Act; but it is not suggested that this makes any difference because a similar section is now to be found in the Indian Independence Act, 1947, being S. 18 thereof. This objection of Mr. Seervai must therefore also fail.

[40] In the course of argument, Mr. Seervai drew our attention to cl. 13 (b) of the Instructions passed under the Royal Sign Manual and Signet to the Governor-General of India on 8th March 1937. That clause provides that the Governor-General shall reserve for the assent of His Majesty any bill which in his opinion would, if it became law, "so derogate from the powers of the High Court of any Province as to endanger the position which these Courts are by the Act designed to fill." Of course the Instru-

ment is no longer in force; but Mr. Seervai contends that it lays down a very wholesome principle that nothing should be done to endanger the position which the High Court has been designed to fill. It is his submission that Act LVII [57] of 1947, taken in conjunction with other Acts which the local Legislature has recently put on the statute book, is calculated to endanger the position which the High Court was designed to fill. I cannot countenance any such argument. In my opinion, if the local Legislature is legislating with regard to any matters within its legislative competence, the only limits to the exercise of that jurisdiction are in the restrictions that may be found in the Indian Independence Act or the Government of India Act. This Court is not concerned with what the effect of such legislation would be on its own jurisdiction. But, even assuming that it was open to us to consider whether the cumulative effect of such legislation might be to endanger the position which the High Court was designed to fill, in my opinion there is at present no reasonable cause for any such apprehension. Depriving the High Court of jurisdiction in cases falling within Act LVII [57] of 1947 does not in the least affect the position which the High Court was designed to fill. Certain other Acts passed by the local Legislature have recently taken away from the High Court its original civil and criminal jurisdiction in certain matters. But that again, to my mind, does not in any sense endanger the position occupied by the High Court. There are many High Courts in India which do not exercise original jurisdiction at all. The fears entertained by Mr. Seervai, therefore, that the local Legislature has some kind of a plan to endanger the position which the High Court occupies under the constitution are to my mind entirely baseless. The result, therefore, is that Act LVII [57] of 1947 is not *ultra vires* the local Legislature.

R.G.D.

*Order accordingly.***A.I.R. (36) 1949 Bombay 56 [C. N. 15.]****CHAGLA C. J. AND TENDOLKAR J.**

Nanalal Zaver and others—Plaintiffs — Appellants v. The Bombay Life Assurance Co., Ltd. — Defendants — Respondents.

O. C. J. Appeal No. 85 of 1947, Decided on 11th March 1948, from judgment of Bhagwati J., D/-10th November 1947.

(a) Companies Act (1913), S. 105C and Sch. 1 Table A Regn. 42 — Object of—Allotment of new shares — S. 105C is to be read with Regn. 42 — Proportion to existing shares is to be maintained as nearly as circumstances admitted.

Under the scheme of S. 105C, it is left to the discretion of the directors to decide whether an increase in the capital of the company is necessary or not. It is

also left to their discretion to determine at what particular point of time the capital should be increased. The only obligation cast upon the directors is that if new shares are issued, then they should be offered to the members in proportion to the existing shares held by each shareholder. The object obviously of the section is that there should be an equitable distribution of shares and that the holding of shares by each shareholder should not be affected by the issue of new shares. The section also makes it incumbent upon the directors to inform the shareholders of the number of shares to which each shareholder is entitled and also limiting the time within which the offer, if not accepted, would be deemed to be declined. [Para 4]

In providing that such shares shall be offered to the members in proportion to the existing shares held by each member, the Legislature did not intend that every one of the shares had to be offered irrespective of the practical difficulties that might result in the working out of such a proposal. Such shares have to be offered as nearly as the circumstances would admit. [Para 5]

Reading S. 105C and Regn. 42 in Sch. 1 Table A, there can be no doubt that what the Legislature intended and what they have expressed in S. 105C is a principle of equitable distribution which has got to be carried out as practically as possible. [Para 6]

The construction of S. 105C cannot possibly vary in accordance with the particular article which a company might choose to frame with regard to the question of the issue of shares. There is no obligation to try and reconcile the articles of a company with S. 105C because the Legislature has had no hand in the framing of the articles of a company. It is only because Regn. 42 in Sch. 1 Table A, has been enacted by the same Legislature that has enacted S. 105C that the necessity arises for placing a construction upon S. 105C which is reconcilable with Regn. 42. [Para 7]

It is not for the Court to decide how many new shares should be issued and to what extent the capital of a company should be increased. That is a matter entirely left to the discretion of the directors. It is only when the issue has been resolved upon that the obligation is cast upon the directors to offer those shares in the particular manner indicated in S. 105C. [Para 8]

Where the directors offered the new shares to be issued, to the existing shareholders in a workable proportion, which left a small number of the shares un-offered, there is no contravention of S. 105C, so long as the principal object of the section was carried out and so long as what the directors did was merely to give a practical effect to the section and to work out its provisions in a practical manner. [Para 5]

(b) Companies Act (1913), S. 105C — Issue of shares—Fiduciary power of Directors—Interference by Court—Discretion to issue new shares must be exercised in interests of company — Company in need of funds—Discretion to issue shares will not be interfered with, whatever other motives might be.

In deciding to issue new shares the directors are exercising fiduciary powers, and they should exercise those powers in the interests of and for the benefit of the company of which they are the directors. If they exercised this power merely for the purpose of maintaining their own control or retaining their own majority, then the Court would interfere and prevent the issue of new shares on the ground that the directors were guilty of a breach of faith towards the company of which they were the directors. But, if it was once established that the company was in need of additional funds and that the fresh issue was decided upon in order to make good those funds, then, whatever other motives might have actuated the directors, the Court will not interfere with the discretion exercised by the directors. However

mixed the motives might be, if it is established that in fact the company was in need of funds, then it could not be said that the exercise of their fiduciary powers by the directors was not a *bona fide* exercise: (1920) 1 Ch. 77, *Rel. on.* [Para 11]

(c) Interpretation of statutes—Provisions dealing with same subject-matter — Provisions should be reconciled.

Where there are two provisions in different parts of a statute dealing with the same subject-matter, it is the duty of the Court as far as possible to reconcile the two provisions. [Para 6]

C. K. Daphtary, Advocate-General and M. P. Amin
— for Appellants.

V. F. Taraporewalla and Purshottam Tricumdas
(for No. 1) and *Purshottam Tricumdas and G. N. Joshi* (for Nos. 2 to 6 and 8) — for Respondents.

Chagla C. J. — This is an appeal from a judgment of Bhagwati J., and the facts leading up to it may be briefly summarised. Defendant 1 company is a limited company which was incorporated in the year 1908. It does life assurance business. Its authorised capital is ten lakhs of rupees divided into 10,000 shares of Rs. 100 each. In 1945 the total number of shares issued was 5,404 paid up as to Rs. 25. The life fund of the company at the end of December 1943 was Rs. 2,30,000. Defendants 2 to 9 are the directors of the company and defendant 2 is the chairman of the board of directors. It seems that in July 1944 Sir Padampat Singhanian in search of fresh financial conquests entered the market and started purchasing shares of this company and these purchases were done through his agents in Bombay. The result of his wanting to purchase shares was to shoot up the price of the shares considerably and the shares which were ordinarily quoted at Rs. 250 went up as much as to Rs. 2,000 in March 1945. The result at the end of December 1944 was that as against defendant 2's group, viz., Maneklal Premchand's group holding 2,397 shares the Singhanian group — and that is how I propose to call Sir Padampat Singhanian's party — had 2,517 shares.

[2] On 18th September 1944, a meeting of the board of directors was convened and the chairman drew attention to the serious situation that had arisen owing to the attempt of a group of persons to purchase the company's shares with a view to get the control of the management of the company and this board meeting decided to issue a circular to the company's share-holders acquainting them with the real facts. It was also decided to authorise the chairman to sign the circular and on the next day, September 19, a circular was issued to various share-holders drawing their attention to what was happening and requesting them to offer their shares if they wanted to sell them, in the first instance, to the chairman. On 8th January 1945, an application was made by the company to the

Examiner of Capital Issues for a fresh issue of capital. The sanction was granted on 20th February 1945, and on 21st February 1945, a meeting of directors was called and at this meeting it was resolved to issue 4,596 shares and to call up Rs. 25 on each of these shares. The shares were to be issued at a premium of Rs. 75. It was also decided that these new shares, viz., 4,596, were to be offered in the first instance to the share-holders of the company as shown on the register of members of 20th February 1945, in the proportion of four new shares to every five shares held by them in the capital of the company on that date. Applications for shares in accordance with the offer made had to be presented and the payment made at the registered office of the company in Bombay on or before 10th March 1945. The resolution also provided that any balance of the shares remaining out of this issue not applied for by 10th March 1945, shall be disposed of by the directors as they might consider best in the interests of the company. A draft circular which was to be issued to the share-holders containing this offer was also placed before the meeting of the board and was approved by the directors. This circular mentioned that the directors reserved the right in their absolute and uncontrolled discretion to accept or refuse any application for shares made by a person in whose favour the share-holder may renounce his right to the whole or any of the shares which the share-holder might be entitled to have allotted to him in terms of the circular. The directors also reserved the right to accept or refuse any application in respect of fractional certificates by a person who was not a share-holder of the company. In fact although 4,596 shares were issued, out of these 272 $\frac{4}{5}$ shares were not offered to the share-holders at all and the balance was offered in the proportion of four shares to every five shares held by the share-holders.

[3] The plaintiffs, who are two share-holders of defendant 1 company and who admittedly belonged to the Singhanian group, have filed this suit challenging this issue of new capital mainly on two grounds: (1) that the new issue contravened the provisions of S. 105-C, Companies Act, and (2) that the issue of shares was not *bona fide* made in the interests or for the benefit of defendant 1 company, but was resolved upon merely with the object of retaining or securing to defendant 2 and his friends control of defendant 1 company. The learned Judge who heard the suit decided against the plaintiffs on both these points and dismissed the suit. Hence this appeal.

[4] The first question we have to consider is whether the issue of further shares by defendant 1 company contravenes the provisions of S. 105-C, Companies Act. The scheme of that

section is fairly clear. It is left to the discretion of the directors to decide whether an increase in the capital of the company is necessary or not. It is also left to their discretion to determine at what particular point of time the capital should be increased. The only obligation cast upon the directors is that if new shares are issued, then they should be offered to the members in proportion to the existing shares held by each share-holder. The object obviously of the section is that there should be an equitable distribution of shares and that the holding of shares by each share-holder should not be affected by the issue of new shares. The section also makes it incumbent upon the directors to inform the share-holders of the number of shares to which each share-holder is entitled and also limiting the time within which the offer if not accepted would be deemed to be declined. It is contended by Mr. Amin on behalf of the appellants that S. 105-C makes it obligatory upon the directors to offer all shares which have been issued for the purpose of increasing the capital of the company, and, says Mr. Amin, that inasmuch as although 4,596 shares were issued, $272 \frac{4}{5}$ were not offered to the share-holders, there is a contravention of the section. According to Mr. Amin, each share-holder should have been offered $4,596/5,404$ shares and whatever absurdity or anomaly might have resulted, the clear provisions of the statute should have been carried out by the directors.

[5] Once the object of the section is clear, and I have indicated what according to me is the object, then the Court must see to it that that object is not defeated by anything which might result in an absurdity or an anomaly. In providing that such shares shall be offered to the members in proportion to the existing shares held by each member, the Legislature did not intend that every one of the shares had to be offered irrespective of the practical difficulties that might result in the working out of such a proposal. In my opinion, such shares have to be offered as nearly as the circumstances would admit. In this case the directors by offering 4,596 less $272 \frac{4}{5}$ shares produced a workable proportion, viz. four shares to the holder of every five shares, and so long as the principal object of the section was carried out and so long as what the directors did was merely to give a practical effect to the section and to work out its provision in a practical manner, in my opinion, there was no contravention of the section. It is said that in giving this construction we are interpolating words which the Legislature did not think fit to incorporate in the section. But it is a well-established canon of construction that the Courts would even go to the length of

adding words to a section if it be necessary in order to give a construction which is a reasonable construction and which helps the Court in achieving the object for which the section was enacted.

[6] I should have put this construction on S. 105-C if it stood by itself. But whatever doubt there might be on the subject is entirely eliminated when one looks at Regulation 42 which forms part of sch. I of the Indian Companies Act. As is well-known, under S. 17 of the Act this schedule forms part of the articles of the company unless a company chooses to have its own set of articles. Certain regulations are compulsory and they are deemed to be included in the articles of a company whether in fact a company includes them or not, and one of the regulations which is not of a compulsory character is Regulation 42 and that regulation says:

"Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notice from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled."

Therefore, when the Legislature enacted a standard form of articles in order to provide for the regulation of a company, it enacted that in offering shares the proportion had to be maintained as nearly as the circumstances would admit. If Mr. Amin's construction were sound, then Regulation 42 would be inconsistent with S. 105 C, and again it is a well established canon of construction that when you have two provisions in different parts of a statute dealing with the same subject matter, it is the duty of the Court as far as possible to reconcile the two provisions. Therefore, reading S. 105-C and Regulation 42 in schedule I, Table A, there can be no doubt that what the Legislature intended and what they have expressed in S. 105C is a principle of equitable distribution which has got to be carried out as practically as possible.

[7] Mr. Amin has drawn our attention to Article 45 of this company's articles which deals with the same subject-matter and Mr. Amin is right that as the company has an article with regard to this subject-matter, Regulation 42 in Schedule I, Table A, would not apply to this company. In this Article 45 we do not find any provision with regard to offering of shares in proportion as nearly as the circumstances admit which we find in Regulation 42. The language of Article 45 practically corresponds to S. 105-C. Mr. Amin says that we must construe S. 105-C in the light of Article 45 and not in the light of Regulation 42 in sch. I, Table A. That, in my opinion, is an entirely untenable argument.

Section 105-C can only have one interpretation, whether it is applied to one company or to another company, and whether it is read in conjunction with one set of articles or another set of articles. The construction of S. 105-C cannot possibly vary in accordance with the particular article which a company might choose to frame with regard to the question of the issue of shares. There is no obligation to try and reconcile the articles of a company with S. 105-C because the Legislature has had no hand in the framing of the articles of a company. It is only because Regulation 42 in sch. I, Table A, has been enacted by the same Legislature that has enacted S. 105-C that the necessity arises for placing a construction upon S. 105-C which is reconcilable with Regulation 42.

[8] Mr. Amin says that instead of issuing 4,596 shares the directors should have issued 4,053 shares in which case they would have been able to offer one share for every three shares held by a share-holder. That is a totally wrong approach to the subject. It is not for the Court to decide how many new shares should be issued and to what extent the capital of a company should be increased. That is a matter entirely left to the discretion of the directors. As I said earlier, it is only when the issue has been resolved upon that the obligation is cast upon the directors to offer those shares in the particular manner indicated in S. 105-C.

[9] It is then urged by Mr. Amin that the issue is illegal and invalid on the ground that the circular issued to the shareholders reserved the right to the directors to refuse to register any nominee in whose favour a share or a fractional certificate offered might be renounced by the shareholder. Article 34 of the company's articles of association empowers the directors at any time in their absolute and uncontrolled discretion and without assigning any reason to decline to register any proposed transfer of shares, and Mr. Amin says that that power does not cover the case of a nominee applying to have his name registered as a shareholder of the company, and Mr. Amin relies on a decision reported in *Pool Shipping Company Ltd., In re*, (1920) 1 Ch. 251 : (89 L. J. Ch. 111), which decided that letters of renunciation of bonus shares in favour of a nominee and of acceptance by that nominee do not, in the absence of special provisions to the contrary, amount to a "transfer" of shares so as to fall within and be subject to the articles of association of the company dealing with the transfer of shares of shareholders already registered. In the first place the question whether a nominee has or has not a right to be registered does not arise in this case. Further, in the case referred to there was

no provision similar to the provision we find in the circular issued by the directors. There the Court was considering only the effect of the article which gave the power to the directors to refuse to accept a transfer of shares. Finally, we have in this case an article, Art. 44, which deals with this very question and which gives the power to the directors to issue new shares upon such terms and conditions and with such rights and privileges annexed thereto as the directors might determine, and, in any case, I fail to see how the introduction of such a condition with regard to the recognition of nominees can possibly vitiate the whole issue of new shares.

[10] Mr. Amin has also contended that the notice given within which application had to be made for new shares or for fractional certificates was too short and unreasonable. The circular was issued, as I have pointed out earlier, on 21st February 1945, and application had to be made by 10th March 1945. Mr. Amin says that the time given was entirely insufficient and unreasonable. In my opinion, this question of sufficiency of notice has more a bearing upon the question of *bona fides* than upon the question of the legality of the issue, and I propose to discuss this contention in some detail when I come to discuss the question of whether the directors exercised their power *bona fide* or not.

[11] Coming now to the main point which has been urged with considerable force by Mr. Amin at the bar, which is, whether the directors acted *bona fide* in resolving upon this new issue of shares. In deciding to issue new shares the directors are exercising fiduciary powers, and it is clear that they should exercise those powers in the interests of and for the benefit of the company of which they are the directors. If they exercised this power merely for the purpose of maintaining their own control or retaining their own majority, then the Court would interfere and prevent the issue of new shares on the ground that the directors were guilty of a breach of faith towards the company of which they were the directors. But, if it was once established that the company was in need of additional funds and that the fresh issue was decided upon in order to make good those funds, then, whatever other motives might have actuated the directors, the Court will not interfere with the discretion exercised by the directors. However mixed the motives might be, if it is established that in fact the company was in need of funds, then it could not be said that the exercise of their fiduciary powers by the directors was not a *bona fide* exercise.

[12] In this particular case it is urged and urged with considerable force that the reason which actuated the directors on 21st February

1945, in resolving to issue new shares was the fear that the Singhanian group would capture the company and oust the present directors from their vantage point and take control of the company itself. It may be that one of the factors that weighed with the directors was that consideration. It may even be that it weighed with them in a great deal. It may also be that the directors selected this particular time, viz. 21st February 1945, for the issue of these shares because of the impending danger of the majority of shares going into the hands of the Singhanian group with the necessary consequences. If, with all that, it is established before the Court that in fact on 21st February 1945, the company was in need of funds, that the funds were required for the working of the company, then the Court will not interfere with the discretion exercised by the directors, because the principle is obvious that if the new shares have been issued because the company needs funds, then it cannot be said that the discretion vested in the directors has been exercised not in the interests of the company or for the purpose of the company. It is only when that discretion is exercised solely for the personal ends of directors, for their personal aggrandisement, for keeping themselves in power, then undoubtedly that discretion cannot be said to have been exercised for the purpose of or in the interests of the company. This principle is clearly laid down in *Piercy v. S. Mills and Company* (1920) 1 Ch 77 : (88 L. J. Ch. 509.) In that case the directors avowedly wanted to increase capital for the purpose of keeping control over the management and it was not even remotely suggested that the company was in need of funds. Under these circumstances, it is obvious that the Court came to the only conclusion which it could, viz., that the issue of shares was a breach on the part of the directors of their fiduciary powers. But it is important to note that in the judgment of Peterson J. it has been continuously emphasised that it is only when the power is exercised merely for the purpose of maintaining their control, or shares have been allotted simply and solely for the purpose of retaining their control, that the Court would interfere with the discretion of the directors. Mr. Amin wants us to read this case to mean, which it does not mean, that the directors should exercise their power only for the purpose of the company and for the benefit of the company or, in other words, that if the Court were to find any motive weighing with the directors which is extraneous to the interests of the company, then the Court should interfere. That is certainly not the law. As I have said earlier, once it is established that the company is in need of funds, then any extraneous considera-

tion which might have weighed with the directors, even any selfish motive that might have weighed with them, is really irrelevant and cannot tilt the balance against the Court holding that the company being in need of funds the issue of new shares was fully justified.

[13] Therefore, addressing myself to the main and only question, whether the company was in need of funds or not, it appears that when the company applied to the Examiner of Capital Issues on 8th January 1945, it gave serially the reasons which necessitated the issue of fresh capital. Four reasons were given for which the proposed issue was to be made. One was to promote and form, and to be interested in, and take hold and dispose of shares in other companies having objects similar to those of this company or doing insurance business of any kind or nature whatsoever, such as fire, marine, aerial, transit, accident, or any other kind of insurance. The second was for the purpose of operating the House Purchase Scheme specially for the benefit of the policy-holders of the company, and the third was to extend the company's organisation in India and particularly in countries abroad where the company's small paid-up capital has been a serious handicap. The fourth was to stand on equal footing and compete for business on equal terms with other similar institutions having large paid-up capital. (After discussing the evidence on the point his Lordship proceeded :)

[14] We have given very careful thought to all the arguments advanced by Mr. Amin. Undoubtedly this is a case of high finance and we have been given a glimpse of what high finance can be, and there is great justification in what Mr. Amin has said as to the manner in which some of the things were done with regard to the affairs of this company. But ultimately we must come down to the one short and simple question, was the company in need of funds at the time when the directors decided upon the issue of new shares, and, in my opinion, there can be no doubt on the evidence led in this case that the answer to that question must be in the affirmative. If that be the position, all other considerations can be of no avail or of very little avail as against this central fact in this case, and, as I am satisfied as to the central fact, I would agree with the learned Judge who took the same view and come to the conclusion that the plaintiffs have failed to discharge the burden which lay upon them of establishing that the issue of new shares was not *bona fide* and not in the interests of and for the benefit of the company.

[15] The result, therefore, would be that the appeal must fail and be dismissed with costs.

[16] **Tendolkar J.**—The facts giving rise to this litigation have been sufficiently stated in the judgment just delivered by my Lord the Chief Justice, and I shall not restate them. There are two questions which have been argued before us on this appeal: (1) whether the offer of shares to existing shareholders is contrary to the provisions of S. 105-C, Companies Act, and (2) whether the new shares were issued *mala fide* by the defendants simply and solely for the purpose of enabling them to retain their control over the affairs of defendant 1 company.

[17] With regard to the first question, S. 105C, Companies Act is in the following terms:

"Where the directors decide to increase the capital of the company by the issue of further shares, such shares shall be offered to the members in proportion to the existing shares held by each member (irrespective of class) and such offer shall be made by notice specifying the number of shares to which the member is entitled, and limiting a time within which the offer, if not accepted, will be deemed to be declined; and after the expiration of such time, or on receipt of an intimation from the member to whom such notice is given that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company."

[18] A literal interpretation of that section would have required the directors in this case to offer to every shareholder 4596/5404th share for each share held by him. In order to avoid this result, it was urged by Mr. Amin for the appellants that the directors should have decided only to issue such a number of shares as would bear a convenient ratio to the shares already held. That argument to my mind is wholly untenable. Section 105-C, Companies Act, does not fetter the discretion of the directors with regard to the decision to increase the capital. They are entitled to exercise their rights with regard to that increase as they may deem proper. Section 105-C only comes into effect after the directors have taken the decision to issue further capital; and, therefore, there is no substance in the contention that the directors should have issued not 4596 shares, as they decided to do, but should have instead issued some other number of shares. Having issued those shares, if Mr. Amin's contention is right and a literal interpretation is to be placed on S. 105C, Companies Act, they should have allotted the whole lot of shares in the proportion of 4596/5404. A mere glance at the statement showing the multiples in which the shares are held, which has been put in as Ex. No. 20 in this case, would clearly show how absurd and inconvenient the result would be. The question that we have to consider is whether we are bound to put upon S. 105 C too literal a construction which would lead to such a result. To my mind,

the answer is to be found in the Companies Act itself. In the first schedule to that Act in Table A, there is Art. 42 which is in the following terms:

"Subject to any direction to the contrary that may be given by the resolution sanctioning the increase of share capital, all new shares shall, before issue, be offered to such persons as at the date of the offer are entitled to receive notices from the company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled. The offer shall be made by notice specifying the number of shares offered, and limiting a time within which the offer, if not accepted, will be deemed to be declined, and after the expiration of that time, or on the receipt of an intimation from the person to whom the offer is made that he declines to accept the shares offered, the directors may dispose of the same in such manner as they think most beneficial to the company. The directors may likewise so dispose of any new shares which (by reason of the ratio which the new shares bear to shares held by persons entitled to an offer of new shares) cannot, in the opinion of the directors, be conveniently offered under this article."

[19] It is contended on behalf of the appellants that we should not look at this article, because admittedly it is not applicable to defendant 1 company. They have in their own articles, Art. 45, which provides for a similar contingency. But it does not follow therefrom that for the purpose of determining what is the true interpretation to be placed on S. 105C, Companies Act, the Court is not entitled to look at Art. 42 in Table A. There may be cases in which both S. 105C and Art. 42 in Table A apply; and the interpretation placed by this Court on S. 105C cannot be any different in those cases from the interpretation that we put upon it in this particular case. We have, therefore, to read S. 105C and Art. 42 in Table A of Sch. 1 together; and it is our duty to reconcile them in so far as it may be possible. There is quite obviously one simple method of reconciling them; and that is that where S. 105C provides that the new shares shall be offered to the members in proportion to the existing shares held by each member, it contemplates that they shall be so offered "as nearly as the circumstances admit," which are the words used in Art. 42. If we read S. 105C in that manner, then no question of any inconvenience or absurdity arises. It is perfectly true that in reading the section in that manner we have got to interpolate in S. 105C the words I have indicated above, viz. "as nearly as the circumstances admit;" but it is a recognised rule of construction that it is open to the Court to interpolate words to obviate the manifest inconvenience and absurdity of too literal a construction when the Court is satisfied that such an absurd result could not have been intended by the Legislature. I have no doubt in this case that the Legislature could not have intended the absurd result which a literal construction involves; and I am, therefore, of the

opinion that S. 105C must be read as I have indicated above.

[20] But, even on the footing of such being the correct interpretation of S. 105C, Mr. Amin for the appellants has contended that the directors should in any event have offered the shares to the existing shareholders not in the proportion of 4 : 5 as they did but in the proportion of 5 : 6. If they did so, the result would have been that instead of 272 $\frac{4}{5}$ shares being left unoffered in the hands of the directors, a small quantity of about 90 shares would have remained unoffered. But, if I am right in holding that under S. 105C the directors are bound to offer the shares to the existing shareholders in proportion to their holdings as nearly as the circumstances admit, then quite obviously the judges of such circumstances must necessarily be the directors of the company; and, except in a case when they decide upon the proportion *mala fide*, the Court shall not interfere. In this case it was suggested that they decided to issue the shares in the proportion of 4 : 5 *mala fide* because they wanted to dispose of the balance of 272 $\frac{4}{5}$ shares as they pleased. But that contention is based upon an entire misconception as to the powers of the directors in this case. The resolution which sanctioned this issue and the circular which was approved at the meeting of the board of directors clearly show that if any shares which were offered were not applied for, the directors would dispose of those shares in the manner they thought fit; but no provision whatever was made by that resolution for the disposal of these 272 $\frac{4}{5}$ shares, and indeed no such provision could have been made under the articles of association of the company, because the power to dispose of these shares, if at all, vested under Art. 45 in the company and not in the directors. That being so, there is no ground for holding that the directors acted *mala fide* in offering the shares to the existing shareholders in the proportion of 4 : 5, and we cannot interfere with their discretion in this matter.

[21] Turning next to the second question which has been argued before us, the whole of this contention is based upon a decision of the Court of Chancery in *Piercy v. S. Mills and Company*, (1920) 1 Ch. 77 : (88 L. J. Ch. 509). That was a somewhat gross case. The directors of a company there came to know that a majority of the shares of that company had been purchased by their manager and that the manager desired to become one of their co-directors. Thereupon the directors proceeded to allot certain shares to themselves and their friends with a view to convert the majority of the manager into a minority and thereby prevent him from becoming a director of the company. Under those circumstances, the

Court of Chancery held that the power given to the directors enabling them to raise the capital was a fiduciary power and was to be exercised *bona fide* for the advantage of the company. The ratio of that case is, to my mind, correctly set out in the headnote which is in these terms :

"When the company is in no need of further capital, directors are not entitled to use their power of issuing shares merely for the purpose of maintaining their control, or the control of themselves and their friends, over the affairs of the company."

[22] That is the law which we have to apply to the facts of this case; and it becomes necessary, therefore, to consider whether fresh capital was necessary for the business of defendant 1 company. On 8th January 1945, an application was made on behalf of the company to the Examiner of Capital Issues in which the purposes for which the company desired to raise further capital have been set out in para. 4. It is urged before us that prior to the date of this application no meeting of the board of directors had been convened to discuss the question of making such an application or to discuss any of these purposes. That is perfectly true. Defendant 2 who was the Chairman of the board of directors, has given evidence and told us that he discussed the question informally with some of his co-directors excluding defendant 7 who was all along siding with the Singhanian group, and this application was made as a result of such discussions. But to my mind, it makes no difference whatever whether this matter was previously discussed by a meeting of the board of directors.

[23] What the Court has got to consider is, whether at the date when the directors decided to increase the capital defendant 1 company was in need of funds. (His Lordship then discussed the evidence on the point and concluded :)

[24] That being so, I am also of the opinion that the company legitimately was in need of funds for the purpose of starting branches abroad.

[25] Numerous acts of the directors in relation to the fresh issue of shares were relied upon as evidence of their *mala fides*. I do not consider it necessary to deal with these acts at any length, because, even assuming that the directors did all these acts with the object of keeping the Singhanian group out of control of defendant 1 company, the moment it is established that the company was in need of further capital for legitimate purposes, the fact that the directors utilised such need for the purpose of establishing themselves more firmly in the saddle does not, in my opinion, render the issue of further capital either *ultra vires* or invalid. I have held that the company was in need of funds; and whatever may have been the conduct of the directors with regard to that issue, and howsoever it may

have enabled them to make their position with regard to the management of defendant 1 company stronger than it was before, the issue cannot thereby be rendered either *ultra vires* or invalid. I, therefore, respectfully agree that the judgment of the trial Court must be upheld and the appeal dismissed.

V.B.B.

Appeal dismissed.

* A. I. R. (36) 1949 Bombay 63 [C. N. 16.]
FULL BENCH

CHAGLA Ag. C. J., BAVDEKAR AND GAJENDRAGADKAR JJ.

Odhavji Lakhamshi—Appellant v. Sakarchand Dahyabhai — Respondent.

First Appeal No. 119 of 1943, Decided on 12th December 1947, from judgment of Macklin and Gajendragadkar JJ., D/- 21st November 1946.

* Civil P. C. (1908), O. 21, R. 16— Notice to judgment-debtor—Decree—Assignment—Application for execution by assignee—Attachment before hearing judgment-debtor's objections—Appearance of judgment-debtor without notice and his objections heard—Title of assignee found established—Order of attachment is bad but application as a whole should not be dismissed—Finding as to validity of assignment must stand : 36 Bom. 58 : 12 I. C. 547, OVERRULED.

Although under O. 21, R. 16 an assignee is entitled to apply for execution, he cannot get the decree executed unless he has established his title to be the assignee after giving notice to the judgment-debtor and after his objections, if any, have been heard by the Court. It is to be noticed that a notice to the judgment-debtor is mandatory. It is the very foundation of the jurisdiction under O. 21, R. 16. But it is equally to be noted that the object of giving the notice is to enable the judgment-debtor to place before the Court his objections, if any, to the execution of the decree, and what is prohibited is the execution of the decree without hearing the objections of the judgment-debtor. [Para 2]

An assignee of a decree applied for execution of the decree. An order for attachment was made though no notice under O. 21, R. 16 had been issued and though the judgment-debtor's objection to the assignment had not been heard. The judgment-debtor came to know about the levying of the attachment and he raised various objections to the assignment and to the title of the assignee to maintain the execution. His objections were heard in full and the Court held that the assignment was good and that the assignee had title to maintain execution. On that, a notice under O. 21, R. 66 in respect of the attached property was issued :

Held that although admittedly no notice was given under O. 21, R. 16 there was no bar against the assignee filing his darkhast and applying for execution. But all the processes in execution which were taken before the judgment-debtor's objections were heard and before the title of the assignee was established were bad in law. Therefore, the order of attachment was bad but the darkhast as a whole could not be dismissed : 36 Bom. 58 : 12 I. C. 547, OVERRULED. [Paras 3 & 4]

Held further that the findings of the lower Court with regard to the validity of the assignment and the title of the assignee must stand, as they were arrived at after the judgment-debtor's objections were heard. Therefore, the order under O. 21, R. 66 issued after the

Judge held that the title of the assignee had been established, must stand. [Para 5]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 16 N. 14.

N. C. Shah — for Appellant.

D. V. Patel — for Respondent.

Chagla Ag. C. J.—This appeal raises a very short question and has been referred to this Full Bench by my brother Gajendragadkar J. and Macklin J. The facts leading up to the appeal are that on 23rd June 1942, the respondent applied for the execution of the decree as the assignee and on 24th June 1942, the executing Court made an order for attachment. On 3rd July 1942, the attachment was levied. The judgment-debtor came to know about the levying of the attachment and he filed a written statement raising various contentions against the assignment of the decree and challenging the title of the assignee to maintain the execution proceedings. His objections were heard and the learned Judge held against him and came to the conclusion that the assignment was good and that the title of the assignee to maintain execution proceedings had been established. On that, he issued a notice under O. 21, R. 66 with regard to the attached property. It is from this order that this appeal is preferred.

[2] The first objection taken by Mr. Shah is that no notice was issued under O. 21, R. 16 and, therefore, the darkhast filed by the assignee should be dismissed. The scheme of O. 21, R. 16 is this. It enables a transferee of a decree to apply for the execution of the decree in the same manner and subject to the same conditions as if the application were made by the decree-holder. Proviso 1 to O. 21, R. 16 contains a certain prohibition and that prohibition is that when the decree is transferred by assignment, notice of the application for execution has to be given to the transferor and the judgment-debtor and the decree shall not be executed until the Court has heard their objections to its execution. Therefore, although under O. 21, R. 16 an assignee is entitled to apply for execution, he cannot get the decree executed unless he has established his title to be the assignee after giving notice to the judgment-debtor and after his objections, if any, have been heard by the Court. It is to be noticed that a notice to the judgment-debtor is mandatory. As the Privy Council has pointed out, it is the very foundation of the jurisdiction under O. 21, R. 16 but it is equally to be noted that the object of giving the notice is to enable the judgment-debtor to place before the Court his objections, if any, to the execution of the decree, and what is prohibited is the execution of the decree without hearing the objections of the judgment-debtor.

[3] In this case although admittedly no notice was given under O. 21, R. 16, the objections of the judgment-debtor were heard in full and adjudicated upon and the learned Judge came to the conclusion that the objections failed and the assignment was proved. Therefore, in our opinion there was no bar against the assignee filing his darkhast and applying for execution but all processes in execution which were taken before the judgment-debtor's objections were heard and before the title of the assignee was established were bad in law. The decree could only be executed after the objections had been heard and the judgment-debtor's (assignee's?) title had been established. To the extent that the learned Judge made the order of attachment, he was doing something which he was not entitled to do, because he was permitting the assignee to execute the decree before he had established his title. But we do not agree with Mr. Shah that not only the order of attachment is bad but the assignee was not entitled to maintain the darkhast and the darkhast should be dismissed.

[4] In support of his contention, Mr. Shah has relied on a decision reported in *Kassum Goolam Hoosein v. Dayabhai Amarsi*, 36 Bom. 58 : (12 I. C. 547). There also no notice was issued to the judgment-debtor on the application for execution by a transferee of a decree and in execution of the decree the judgment-debtor's property was attached in his shop by seizure. The Division Bench consisting of Sir Basil Scott C. J. and Batchelor J. held that the execution of the decree by attachment was unlawful and not merely irregular and they proceeded not only to set aside the attachment proceedings but also to dismiss the darkhast filed by the transferee. With great respect to the learned Judges, in our opinion this case was wrongly decided because what followed upon the finding that the execution of the decree was unlawful was the setting aside of the particular process in execution which had been adopted by the decree-holder. The dismissal of the darkhast did not logically follow upon that finding because, as we have pointed out, there is nothing in law to prevent a transferee from filing his darkhast and applying for execution before he has established his title and before notice has been issued under O. 21, R. 16. The learned Judges seem to have taken the view that a transferee cannot apply for execution before notice has been served on the judgment-debtor under O. 21, R. 16. That, with very great respect, is not the correct view of the law. We, therefore, are of opinion that the order of attachment must be set aside, but the darkhast need not be dismissed.

[5] But Mr. Shah has contended that not only the order of attachment must go but even the

findings given by the learned Judge as to the status of the assignee and as to the validity of the assignment should also be set aside. We cannot accept that contention. Mr. Shah says that these findings were arrived at in the absence of any notice given to him under O. 21, R. 16. That is perfectly true. But as we have pointed out, the object of the notice is to enable the judgment-debtor to submit his objections. If in fact he has submitted his objections and those objections have been heard, then he cannot be heard to say that that adjudication is bad because he did not receive the notice. These findings are not in any sense a part of the execution of the decree. If they were, then certainly Mr. Shah would be right that the decree could not be executed till the title of the assignee has been established. It is obligatory upon the learned Judge to hear the objections and to decide the question as to the validity of the assignment. What he did was under an obligation to do under O. 21, R. 16. He only did it without issuing the necessary notice, but that is a mere irregularity which has been cured by the judgment-debtor appearing, putting in a written statement and filing his objections. We, therefore, hold that the findings of the learned Judge with regard to the validity of the assignment and the title of the assignee must stand. Therefore, the order of attachment will be set aside. But as regards the final order under O. 21, R. 66 which was issued after the learned Judge held that the title of the assignee had been established, [it] must stand. Therefore, the appeal being from that final order, the appeal must be dismissed. No order as to costs.

V.B.B.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 64 [C. N. 17.]

SEN AND GAJENDRAGADKAR JJ.

Kurbanhussein Mahomedali Kharodawala
— Plaintiff — Appellant v. *Husseinbhai Mithabhai Dhabu and others*—Defendants—Respondents.

Second Appeal No. 720 of 1943, Decided on 31st July 1947, from order of Dist. Judge, Broach and Panchmahals at Godhra, in Appeal No. 3 of 1939.

(a) Limitation Act (1908), Art. 144—Scope—Arbitrators having authority, dividing and allotting immovable property to various disputants—Award is one creating interest in immovable properties—Suit for recovery of such immovable property—Suit based on title derived from award—Article applicable is Art. 144 and not Art. 120—Limitation Act (1908), Art. 120.

While considering the question as to whether an award is capable of creating an interest in immovable property it would have to be considered whether the terms of the award itself purport to create such interest and whether the arbitrators had authority to create such interest. If the answers to these two questions are in the affirmative, then such an award is capable of

creating an interest in property: A. I. R. (35) 1948 Bom. 101 (F. B.), *Followed*. [Para 3]

Where the arbitrators appointed by the partners to decide disputes between them had authority to divide the partnership property and the arbitrators in pursuance of this authority divided the property and allotted to the partners the properties to which the arbitrators thought they were entitled, the award in terms created an interest in immovable properties in favour of the various partners. [Para 4]

A suit by one of the partners to recover immovable property on the basis of the title created by such award is essentially a suit to recover immovable property to which Art. 144 applies. It is the relief claimed by the plaintiff and not the basis on which the said claim is made, that really determines the question of limitation: 28 Bom. 1, *Applied*; A. I. R. (8) 1921 Bom. 389 and A. I. R. (12) 1925 Bom. 519, *Commented and not followed*; 23 Mad. 593 and 33 Cal. 881, *Rel. on*; A. I. R. (15) 1928 Bom. 264, *Ref.* [Para 5]

Article 120 does not apply to the case. It is not a suit to enforce the award. If the award is valid, it is operative even though, neither party has sued to enforce it by a regular suit or by a summary procedure: 18 Cal. 414 (P. C.), *Rel. on*. [Para 9]

Annotation: ('42-Com.) Lim. Act, Arts. 142 and 144, N. 3.

(b) *Precedents* — Same High Court—Conflict on points between Division Benches—Two views held—Subsequent Division Bench can follow any. [Para 8]

S. M. Shah and V. T. Gambhirwala—for Appellant.

J. C. Shah and N. C. Shah—for Respondent No. 1.

Gajendragadkar J.—The suit giving rise to the present appeal had been filed by the plaintiff to recover possession of four items of immovable property on the ground that he was entitled to them by virtue of an award made on 2nd March 1925. The plaintiff's case was that he, the defendant, and two others were carrying on business in partnership at Dohad, and that the said partnership owned some properties. While the partnership was being carried on, disputes arose between the partners which the partners referred to five persons as arbitrators of their choice and confidence. The arbitrators examined the documents consisting mainly of the account books of the partnership and made their award on 2nd March 1925. Under this award, the plaintiff was given the properties in respect of which the present suit has been filed. After the award was made by the arbitrators, the plaintiff filed an application under para. 20 of Sch. II, Civil P.C. in the Court of the First Class Subordinate Judge at Nadiad. The said application was numbered as a suit, but eventually the plaintiff withdrew the said application on the ground that he had recovered some of the properties allotted to him under the award and would have to file a suit for the possession of the remaining properties in the Dohad Court. The application was withdrawn on 6th January 1926 without the Court's permission to file a fresh application in future. Thereafter the plaintiff took no steps until he filed the present suit on 25th February

1937 almost precisely within 12 years from the date when the award was made.

[2] The claim thus made by the plaintiff was resisted by the defendant on several grounds, only three of which need be mentioned at this stage. It was urged by him that the suit was barred under the provisions of O. 23, R. 1, Civil P. C., 1908 by reason of the fact that the application made by him in the Nadiad Court was withdrawn after it had been numbered as a suit. He also urged that the present suit was barred by *res judicata*. To these two pleas was added a third plea of limitation; the contention for the defendant being that the suit was one to enforce an award and not one for the recovery of possession of immovable property, and that such a suit is governed by Art. 120, Limitation Act. It is obvious that, if Art. 120 were to be applied, the suit is clearly beyond time. The three pleas to which I have just referred gave rise to three issues which were tried as preliminary issues in both the Courts below. The learned trial Judge negatived the defendant's plea that the suit was barred by O. 23, R. 1 or by *res judicata*. He, however, accepted the plea made by the defendant that the suit was barred by limitation and so dismissed the plaintiff's suit. He held that the suit was one for the enforcement of the award and was governed by Art. 120, Limitation Act. When the matter went in appeal, the learned District Judge took the same view on the three questions that arose for his determination, with the result that he dismissed the appeal and affirmed the decree passed by the learned trial Judge. It was against this decree that the plaintiff preferred the present second appeal. When this appeal was argued before Macklin and Bavdekar JJ. on 27th September 1946, Mr. S. M. Shah for the plaintiffs contended that the decision of the Courts below on the question of limitation was wrong; and he argued that the suit was clearly one for possession of immovable property and as such would be governed by Art. 144, Limitation Act. Mr. Shah also referred to the fact that the reported decisions of this Court on which the Courts below had relied in dealing with the question of limitation did not strictly apply to the facts of the present case and that some observations in the said decisions may have to be reconsidered since they were in conflict with the consensus of judicial opinion prevailing in the other High Courts in this country.

[3] On behalf of the respondents a new point was raised at the hearing of this second appeal. It was urged by Mr. J. C. Shah on behalf of the defendant-respondent that "an award by itself cannot create rights in immovable property and if that is so it is evident that a suit to obtain

possession of land to which the plaintiff was given a title by means of an award would in effect be a suit to enforce an award and the plaintiff could not obtain possession until judicial effect is given to the award." The learned Judges took the view that the point thus raised by the respondent was of "some difficulty and importance," and so they referred the said point to a Full Bench. That is how this second appeal went before a Full Bench for the determination of the question referred to them. In the opinion of the Full Bench, while considering the question as to whether an award is capable of creating an interest in immovable property it would have to be considered whether the terms of the award itself purport to create such interest, and whether the arbitrators had authority to create such interest. If the answers to these two questions are in the affirmative, then such an award is capable of creating an interest in property: *Kurbanhussein v. Huseinbhai*, 49 Bom. L. R. 731 : (A. I. R. (35) 1948 Bom. 101 F. B.). With this answer of the Full Bench the second appeal has come to us for disposal according to law.

[4] The award in this case recites that the arbitrators had been given authority by a writing duly executed by all the partners on 24th October 1924, "to divide their joint property." The award then proceeds to say that by virtue of the said authority the arbitrators had heard all the disputes and examined whatever documents and account books that were produced before them and had ascertained dues and outstandings and properties of the partners. They had also taken into account all the matters from the date of the reference paper till the date when the award was pronounced and had considered the rights and liabilities of all the parties in reference to the disputes referred to them. In conclusion the arbitrators effected a division of the properties belonging to the partnership between the partners and serially set out the properties that fell to the respective shares of the partners concerned. It would thus be clear that the arbitrators definitely averred in their award that the dispute that was referred to them was one which had arisen between the partners as regards the division of the partnership properties, and that they had been given authority to divide the said properties after hearing all the partners and considering such evidence as would be produced before them. In the plaint similar allegations were made about the nature of the reference made and the authority of the arbitrators, and the plaintiff had alleged that the award made under the said circumstances was binding on all the partners. On that basis the plaintiff had prayed for possession of the properties to which

he was entitled under the award and which had still not been delivered to him by the defendant. In his written statement the defendant raised several contentions in addition to the three which I have already referred to. It was, however, expressly admitted by the defendant that the reference in writing had been made by the parties concerned to five persons; and it has not been denied that pursuant to the said reference an award had in fact been made. The written statement makes several contentions about the unsatisfactory manner in which the award has been made. It has been alleged that certain properties of the partnership have not been divided, and that certain properties exclusively belonging to the defendant have been dealt with as though they belonged to the partnership. It has also been urged in the written statement that Kurbanhussein Lukmanji was not the arbitrator of the defendant's choice and had not been appointed as an arbitrator by the partnership when the reference paper was signed. It is the defendant's case that this Kurbanhussein took part in the arbitration proceedings, and the award for that reason would be invalid and not binding on the defendant. Though all these contentions were raised in great detail, the plaintiff's allegation that a reference was made to the arbitrators asking them to divide the partnership properties between the partners has not been denied. In these circumstances it seems to us that it would be reasonable to infer that the parties are not at dispute on the question as to whether the arbitrators had been in fact asked to divide the properties of the partnership. Since the dispute almost entirely centred round the division of the immovable properties belonging to the partnership, it is indeed inconceivable that without giving the arbitrators the authority to divide the properties they could have been asked to decide the dispute in any manner at all. It is true that the reference paper is not on the record, but the absence of the reference paper is, in our opinion, immaterial having regard to the recital in the award as to the contents of the reference paper and having regard to the fact that the allegations made in the plaint in that behalf have not been denied, either expressly or by necessary implication, in the written statement. Assuming that the arbitrators were given authority to divide the properties of the partnership between the contending partners, the next question which arises for decision is, does the award purport to divide the properties? The answer to this question is obvious, and indeed there is no dispute before us on this point. The award does in terms effect a division of the properties of the partnership and proceeds to allot to all the partners the properties to which the

arbitrators thought they were entitled. On this view it must be held that the arbitrators had the necessary authority to divide the properties in question and the award made by them has in terms created an interest in the immovable properties in suit in favour of the plaintiff; since the two conditions laid down by the Full Bench are thus satisfied, it follows that the award is in law capable of creating an interest in property in favour of the plaintiff and has in fact created such interest in his favour.

[5] That being the position of the award and the rights created under it, the question of limitation would ordinarily have presented no difficulty; the plaintiff in terms claims to recover immovable property and makes reference to the award as constituting the basis of the plaintiff's title. It is the relief claimed by the plaintiff ... and not the basis on which the said claim is made.....that really determines the question of limitation. If the award creates a title in favour of the plaintiff in regard to the properties in suit, the plaintiff's claim to recover possession of the said properties on the strength of the award can, we think, be treated as similar to a claim to recover possession of properties on the strength of a sale deed. In both cases the plaintiff claims to recover possession of certain properties and sets up a title in himself with regard to them. The title in one case may be evidenced by a sale deed and in another by an award. The difference in evidence as to the basis of the title cannot, in our opinion, affect the nature of the suit. In either case it is essentially a suit to recover possession of immovable property; and we are disposed to hold that such a suit would be governed by Art. 144, Limitation Act. Both the Courts below have, however, taken a contrary view and have held that Art. 120 applies; in arriving at the said conclusion they have relied upon some reported decisions of this Court. It is, therefore, necessary to examine these decisions.

[6] The first material decision is to be found in *Fardunji Edalji v. Jamsedji Edalji*, 28 Bom. 1 : (5 Bom. L. R. 705). In this case this Court was dealing with the plaintiff's claim to recover a certain sum of money with interest due on an award, and on the failure of the defendant to pay, for the recovery of the said sum from the defendant's property. The defendant resisted the plaintiff's suit on the ground that it was a claim for specific performance which could not be sustained having regard to the provisions of ss. 21 and 30, Specific Relief Act. Jenkins C. J., however, negatived this contention (page 3) :

"The first of these objections" said Jenkins C. J. "proceeds on the assumption that the suit is one for specific performance, but in our opinion it clearly is not; it is a suit for the recovery of money and for relief incidental thereto."

It may be pointed out that after this pronouncement from Jenkins C. J. all the High Courts in India have similarly negatived the contention that a suit to obtain relief on the basis of an award is a suit for specific performance. This decision then clearly supports the proposition that a suit to recover money does not cease to be a suit for money as such merely because the claim for money is based, not upon a contract, but upon an award. By parity of reasoning, a suit for possession of immovable property would, in our opinion, have to be regarded as a suit for possession of such immovable property, notwithstanding the fact that the claim to the property is based upon the provisions of an award.

[7] The next decision is to be found in *Rajmal Girdharlal v. Maruti Shivram*, 45 Bom. 329 : (A.I.R. (8) 1921 Bom. 389). In the said case the parties to a mortgage had referred their disputes to arbitration out of Court and in due course an award had been made. It was followed by an application under para. 20 of Sch. 2 of the old Code; but the said application was rejected. The unsuccessful party then sued on the award, but his claim was resisted on the ground that the refusal by the Court to file the award operated as *res judicata*. A plea of limitation was also raised. Both the pleas were rejected by this Court. While dealing with the question of limitation, Macleod C. J. observed that

"the suit is not barred by limitation, because it seems to be settled now that a suit to enforce an award is a suit not provided by any other Article of the Limitation Act. Then the time is six years under Art. 120."

I may mention that the effect of this decision was to enlarge the period of limitation for the plaintiff's claim on the ground that the claim was one to enforce an award. If it had been held that the claim was one to recover money, the period of limitation would have been three years and not six. Fawcett J. agreed with the conclusion of the learned Chief Justice but contented himself with the observation that the suit was not one for specific performance and as such did not fall within Art. 113, Limitation Act. In terms the learned Judge referred to the observations of Jenkins C. J. in *Fardunji Edalji v. Jamsedji Edalji*, 28 Bom. 1 : (5 Bom. L. R. 705). I may also point out that, though Macleod C. J. observed that the view which he took about the article of the Limitation Act applicable to the suit with which he was dealing was well settled, no authority was cited in support of the said view and no reference was made to *Sornavalli Ammal v. Muthayya Sastrigal*, 23 Mad. 593 : (10 M. L. J. 208) which had been cited in the course of arguments and which had taken a contrary view. The same view on the question

of limitation was taken by Macleod C. J. and Coyajee J. in *Nanlal Lallubhai v. Chhotalal Narsidas*, 49 Bom. 693 : (A. I. R. (12) 1925 Bom. 519). In his judgment Macleod C. J. referred to his prior decision in *Rajmal Girdharlal v. Maruti Shivram*, 45 Bom. L. R. 329 : (A. I. R. (8) 1921 Bom. 389), and held that Art. 120 applied. His attention was invited to the decision of Jenkins C. J. in *Fardunji Edalji v. Jamsedji Edalji*, 28 Bom. 1 : (5 Bom. L. R. 705) and it was contended that the ratio of the said decision was inconsistent with the view which he was disposed to take. As I have already mentioned, in *Fardunji's case*, 28 Bom. 1 : (5 Bom. L. R. 705) Jenkins C. J. had taken the view that a suit to recover money was a suit to recover money as such and not one for the specific performance of the contract. Macleod C. J., however, dealt with the said decision in these words (p. 695) :

"The question there was whether a suit on an award was a suit for specific performance; so far as we can gather, there was no question of limitation argued before the Court, nor was it decided that a suit to enforce an award is in reality a suit to recover money directed by the award to be paid to the successful party, so that the period of limitation for such a suit was three years and not six."

It is quite true that in *Fardunji's case*, 28 Bom. 1 : (5 Bom. L. R. 705) the question of limitation had not been raised; but it is hardly necessary to point out that Jenkins C. J. had in fact held that the suit before him was in reality a suit to recover money, notwithstanding the fact that the plaintiff's claim was based on an award.

[8] The same question had arisen in a different form in *Ishram v. Trimbak*, 30 Bom. L. R. 675 : (A. I. R. (15) 1923 Bom. 264) where the claim to enforce a charge created by an award was the subject-matter of the suit. In dealing with the question of limitation Fawcett J. was apparently inclined to hold that a claim to enforce a charge would be governed by Art. 132, notwithstanding the fact that the charge had been created by an award. But since the suit with which his Lordship was dealing had been filed within six years from the date when the cause of action accrued, the question as to whether Art. 132 or Art. 120 applied was immaterial, for on either view the suit was within time; that is why Fawcett J. did not pursue the point any further. On these authorities the position is that a Division Bench of this Court has held in *Fardunji Edalji v. Jamsedji Edalji*, 28 Bom. 1 : (5 Bom. L. R. 705) that a suit to recover movables or money is a suit for the recovery of such movables or money in spite of the fact that the claim is based on an award. On the other hand, there are two decisions of a Division Bench of this Court in which it has been held that a suit to recover money on an award should be

regarded as a suit to enforce award to which the residuary Art. 120 should be applied. There is apparently some conflict in the views thus expressed; and we think it is open to us to follow either of the two views which appears to us to be reasonable. We would prefer to follow the view expressed by Jenkins C. J. in *Fardunji's case*, 28 Bom. 1 : (5 Bom. L. R. 705). Besides the question of limitation which arises for determination in this case cannot strictly be regarded as concluded by the other decisions to which I have already referred. In the present case we are dealing with plaintiff's claim to recover possession of immovable property; whereas in the said decisions a claim for money or movables was involved. It is of course true that the reasoning adopted by Macleod C. J. is inconsistent with the reasoning which we prefer to adopt, but we are not prepared to say that we are bound by the said reasoning. Besides it may be pointed out that in dealing with the question referred to them the Full Bench—of which I was a member—have cited with implied approval the Madras and Calcutta decisions which hold that claims for possession of immovable property are governed by Art. 144 though such claims are based on an award. It may be useful to refer to some of these decisions.

[9] In *Sarnavalli Ammal v. Muthayya Sastri*, 23 Mad. 593 : (10 M. L. J. 208) it was held that a suit to enforce an award cannot be regarded as a suit for specific performance of the contract within the meaning of Art. 113, Limitation Act. It was pointed out that an award is the decision of the tribunal constituted by the parties and is a document which declares title of the parties and is evidence of such title on the date on which the award is made. In that view the suit must be considered as one for the reliefs claimed on the basis of the title as evidenced by the award. To the same effect is the decision of the Calcutta High Court *Bhajahari Saha Banikya v. Behari Lal Basak*, 33 Cal. 881 : (4 C. L. J. 162) wherein it was held that a suit for recovery of possession of land on the declaration of the plaintiff's right thereto on the basis of an award made by the arbitrators appointed by the parties is one to which Art. 144 of Sch. II, Limitation Act applies and may be brought within 12 years of the date of the award. In repelling the argument that Art. 120 should be applied to such a suit, Mookerjee J. observed that the said argument is based on the assumption that an award does not create any rights until it has been enforced either by an application under s. 525, Civil P. C., (para. 20 of Sch. II, Civil P. C., 1908) or by a regular suit. He then referred to the decision of the Privy Council in *Muhammad Nawaz Khan v. Alam*

Khan, 18 I. A. 73 : (18 Cal. 414 (P. C.)) in support of the proposition that "if an award is valid, it is operative even though neither party has sued to enforce it by a regular suit or by a summary procedure." "This conclusion" observed Mookerjee J.,

"is based upon the elementary principle that, as between the parties and their privies, an award is entitled to that respect, which is due to the judgment of a Court of last resort. The award is in fact a final adjudication by a Court of the parties' own choice, and until impeached on sufficient grounds in an appropriate proceeding, an award, which is on the face of it regular, is conclusive upon the merits of the controversy submitted, unless possibly the parties have intended that the award shall not be final and conclusive."

With these observations I respectfully agree. The Allahabad High Court has taken a similar view. In *Sarnavalli Ammal v. Muthayya Sastrigal*, 23 Mad. 593 : (10 M. L. J. 208) the argument that a claim made for certain reliefs on the strength of the provisions of an award amounts to a claim on a contract was negatived, and it was observed that it cannot on that ground be contended that awards are contracts, because it would then have to be similarly contended that directions in a will or codicil to execute a particular settlement are also contracts. It was also pointed out that, though an award springs out of an agreement to submit to arbitration, an award itself is a decision of the arbitrators binding upon the parties as a decision. It was accordingly held that in such circumstances a suit based upon an award to recover possession of immovable properties must clearly fall under Art. 144, Limitation Act. As observed by the Privy Council in *Muhammad Nawaz Khan v. Alam Khan*, 18 I. A. 73 : (18 Cal. 414 (P. C.)) an award must have its full legal effect and it is binding on the parties as much as a decree of the Court would be, and the binding character of the award is not shaken merely by reason of the fact that the summary procedure available to the parties to have a decree in terms of the award has not been adopted or has proved infructuous. If the award amounts to a decision of the domestic tribunal on the points in dispute between the parties, we see no difficulty in holding that a claim to recover immovable properties on the strength of the title created by such an award must be treated as a claim to recover immovable properties and as such it must be governed by Art. 144. That being our view, we must hold that both the Courts below were wrong in treating the plaintiff's suit as barred by limitation.

[10] This decision on the question of limitation does not, however, terminate the proceedings in the suit; but instead it necessitates a remand of the case to the trial Court for the determination of the remaining issues. We ac-

cordingly set aside the decree passed by the lower appellate Court and remand the suit to the trial Court for disposal according to law.

[11] Having regard to the fact that this litigation has already been unduly protracted, we direct that the learned trial Judge should deal with this suit as expeditiously as he can after the record and proceedings are received in his Court.

[12] The appellant will be entitled to his costs in this Court. Costs in the lower appellate Court and in the trial Court will be costs in suit.

Decree set aside and case remanded.

R.G.D.

A. I. R. (36) 1949 Bombay 69 [C. N. 18.]

CHAGLA C. J. AND TENDOLKAR J.

The Commissioner of Income-tax, Bombay City v. Dhanmal Chellaram — Assessee.

Income-tax Ref. No. 25 of 1947, Decided on 19th March 1948.

Income-tax Act (1922), Ss. 27 and 22 (2) and (4)—Application for setting aside assessment — Sufficient cause — Cause shown by assessee before Income-tax Officer found insufficient — Assessee alleging invalidity of notice under S. 22 (2) for first time before tribunal — Assessment cannot be set aside.

Under S. 27 it is for the assessee to show cause and it is for the Income tax officer to be satisfied that the cause shown is a sufficient cause. But before the assessee can succeed in setting aside the assessment under S. 27, there must be found as a fact that a particular cause shown by the assessee operated upon his mind which prevented him from complying with the notice under S. 22 (4). Where the cause shown by the assessee before the Income-tax Officer or the Appellate Assistant Commissioner is found insufficient and is entirely different from the one which he pleads before the Tribunal for the first time, namely as to the invalidity of notice under S. 22 (2), it cannot be said that the invalidity of the notice under S. 22 (2) in fact prevented the assessee from complying with notice under S. 22 (4) and therefore, the assessee cannot succeed in setting aside the assessment. [Paras 3, 5]

Annotation : ('46-Man.) Income-tax Act, S. 27 N 1.

C. K. Daphtary, Advocate-General and G. N. Joshi — for Commissioner of Income-tax.

H. M. Seervai — for Assessee.

Chagla C. J. — In this case the assessee was served with a notice under S. 22 (2) for the assessment year 1939-40 on 13th July 1939, and a notice under S. 22 (4) for production of books was served on him on 6th January 1941. With regard to the production of books, extension of time was granted to him until 25th February 1941, when some books were produced but other books were not produced. That assessment was completed on 22nd September 1943. For the assessment year 1940-41 notice under S. 22 (2) was served on 20th July 1940, and notice under S. 22 (4) was issued on 11th February 1941. No books were produced. Assessment was completed on 22nd September 1943. For the assessment

year 1941-42 a notice under S. 22 (2) was served on 6th June 1941, and notice under S. 22 (4) was served for production of books on 11th August 1943. Time was extended till 31st August 1943. The assessment was completed on 22nd September 1943. Then the assessee applied to the Income-tax Officer under S. 27 to set aside these assessments, but the Income-tax Officer declined to do so, and the Appellate Assistant Commissioner on appeal agreed with the Income-tax Officer. Then the matter went before the Appellate Tribunal, and for the first time a point was urged by the assessee that inasmuch as the notice issued under S. 22 (2) and S. 22 (4) was invalid, further time should have been given to him and that there was sufficient cause for his not producing the books when called upon to do so.

[2] It is perfectly true that when the three assessments were made, the notices that were issued under S. 22 (2) or 22 (4) were in the eye of the law bad notices, but Ordinance 45 of 1944 which was promulgated on 3rd October 1944, validated all these notices. The question that arises is whether notwithstanding the validation of these notices, the fact that at the time when the notices were issued they were invalid constituted sufficient cause within the meaning of S. 27 which prevented the assessee from complying with the notices under S. 22 (4).

[3] It has got to be remembered that under S. 27, it is for the assessee to show cause and it is for the Income-tax Officer to be satisfied that the cause shown is a sufficient cause. It was never suggested by the assessee before the Income-tax Officer, or before the Assistant Appellate Commissioner, or, even as a matter of fact, before the Appellate Tribunal that the reason why he could not comply with the notices under S. 22 (4) was that he thought those notices were bad in law and he was under no obligation to produce the books. The cause which he showed before the Income-tax Officer and the Appellate Assistant Commissioner was an entirely different cause and that cause was found insufficient by both those officers. It was only before the Tribunal that this point was urged, not on the ground that the supposed invalidity of the notice weighed upon the mind of the assessee and prevented him from complying with the notice, but purely as a matter of law that inasmuch as the notices were invalid at the time when they were issued, their validation subsequently did not prevent the assessee from putting forward the case of sufficient cause under S. 27. We fail to see how a question of law in this form can arise with regard to the sufficiency of cause shown by the assessee. There must be found as a fact that a particular cause operated upon the mind of the assessee which prevented him from

complying with the notice. That is a pure question of fact. The sufficiency of it may be a question of law, but in this case the very basic fact is absent, viz., that the invalidity of the notice did operate upon the mind of the assessee and thereby prevented him from complying with the notice. Therefore, in my opinion, the Tribunal was not right in coming to the conclusion that the assessee was prevented by sufficient cause from complying with the notice.

[4] Mr. Seervai has relied on two authorities as supporting his contentions. In my opinion neither of the two cases really helps him. The first is a judgment of Sir John Beaumont reported in *Govindram Seksaria v. Commissioner of Income-tax (Central) Bombay*, 45 Bom. L. R. 168 : (A. I. R. (30) 1943 Bom. 122). In that case, notice under S. 22 (2) and S. 22 (4) was issued by the Income-tax Officer, Special Circle, instead of the Income-tax Officer having jurisdiction in the particular locality, and his jurisdiction to issue notice was challenged by the assessee. Then an attempt was made by the assessee to set aside the assessment under S. 27 on the ground that they were prevented from complying with the terms of the notice by sufficient cause. Sir John Beaumont held that the notice that was issued was bad inasmuch as the Officer who issued it had no jurisdiction, and he also came to the conclusion that there was sufficient cause preventing the assessee from complying with the terms of the notice. In this case also an Ordinance was issued validating the notice. The Ordinance was issued on 3rd January 1940, and Sir John Beaumont held that up to 30th December the assessee was entitled to refuse to produce their books to an officer who had no right to assess the tax. But the important thing to bear in mind is this that the assessee was conscious of the fact that the officer who had issued notices had no jurisdiction. They had asserted their right not to be assessed by that officer and they had challenged his jurisdiction. So all these facts had weighed with them when they refused to produce the books and on that Sir John Beaumont held that, although the Ordinance subsequently validated the notice, till the validation the assessee had sufficient cause for not producing the books. The facts before us, as I have pointed, are entirely different. At no stage and at no time was it suggested by the assessee that he was under the impression that the notice issued under S. 22 (2) or S. 22 (4) was an invalid notice.

[5] The other case relied upon is *Commissioner of Income tax v. Ekbal & Co.*, 47 Bom. L. R. 181 : (A. I. R. (32) 1945 Bom. 316). There Sir Leonard Stone and Kania J. held that notice under S. 22 (2) was not a valid notice as

it did not allow the assessee the time for making the assessment which was required under the law. The point as to the validity of the notice was not taken by the assessee either before the Income-tax Officer or the Appellate Assistant Commissioner and it was taken for the first time before the Tribunal. Notwithstanding this both the learned Chief Justice and Kania J. came to the conclusion that the assessee was entitled to have the assessment set aside. From this Mr. Seervai argues that although the assessee did not put forward the contention with regard to the invalidity of the notice either before the Income-tax Officer or the Appellate Assistant Commissioner, he is still entitled to take the point as it is a point of law. It is perfectly patent that if there is a factor which goes to vitiate the notice or to render it invalid or illegal, such a point can be taken at any stage and there would not be anything like an estoppel operating against the assessee. But here we are not concerned with the invalidity of the notice. The whole reference proceeds on the assumption that the notice has been rendered valid and it must be deemed to be valid at all times. The only question we have got to consider is whether the particular cause on which Mr. Seervai is relying was a cause which in fact prevented the assessee from complying with the notice under S. 22 (4) and, as I have said, as that cause was never suggested, the assessee must fail to have his assessment set aside under S. 27. We therefore, answer the question in the negative. The assessee to pay the costs.

K.S.

*Answer in the negative.***A. I. R. (36) 1949 Bombay 71 [C. N. 19.]**

CHAGLA C. J. AND BAVDEKAR J.

Atmaram Narayan Patil — Applicant

v.

Emperor.

Criminal Revn. Appln. No. 120 of 1948, Decided on 15th April 1948, from order of Addl. Resident First Class Magistrate, Thana.

(a) Government of India Act (1935), Ss. 107 and 311—Hindu law is not "existing Indian law" within the sections.

Because Hindu law is applied in the administration of justice by directions of a competent Legislature, it does not follow that Hindu law was passed or made by a Legislature. The word "passed" in S. 311 cannot be read as meaning "approved or adopted by the Government." The words can only mean as "having received the sanction or imprimature of the Legislative authority." Hence Hindu law is not an "existing Indian law" within the meaning of Ss. 107 and 311. [Para 7]

(b) Criminal P. C. (1898), S. 198—Offences under Prevention of Bigamous Marriage Act (XXV [25] of 1946)—Complaint under S. 198 of aggrieved party not necessary.

By reason of S. 9, Bombay Prevention of Bigamous Marriage Act which makes offences under the Act

cognisable, the complaint of the aggrieved party required by S. 198, Criminal P. C. is no longer necessary for the initiation of the prosecution : A. I. R. (35) 1948 Bom. 374, *Foll.* [Para 8]

(c) Prevention of Bigamous Marriage Act (XXV [25] of 1946), S. 5—Offence under, need not necessarily be tried by Court of Session but can be tried by Presidency Magistrate or Magistrate of First Class.

An offence under S. 5 is not an offence against "other law" within the meaning of that expression as used in Sch. 2, Criminal P. C., but it is an offence which has been made an offence under S. 494, Penal Code itself. Hence the proper forum for the trial of the offence is not necessarily the Court of Session but may be a Presidency Magistrate or a Magistrate of the First Class. [Para 9]

W. A. Rege, A. R. Deval and Y. N. Chaphekar —

for Applicant.

S. B. Jathar, Asst. Government Pleader —

for the Crown.

Chagla C. J.—This is an application in revision against an order passed by the Additional Resident Magistrate, Thana, by which he convicted the accused under S. 5, Bombay Prevention of Bigamous Marriage Act, 1946, read with S. 494, Penal Code, 1860, and sentenced him to one day's simple imprisonment and a fine of Rs. 10.

[2] Applicant 1 along with three others were tried by the Additional Resident Magistrate, Thana. The applicant was charged with having married accused 2 while the first marriage was subsisting. Accused 3 was the father of the applicant and accused 4 was the brother-in-law of accused 2. The father of the applicant and the brother-in-law of accused 2 were charged with having aided and abetted in the solemnisation of the marriage. The learned Magistrate convicted all the four accused, and there was an appeal from his decision to the Court of Session, and the learned Sessions Judge dismissed the appeal. From that decision only the applicant who was accused 1 has come in revision before us.

[3] Mr. Rege, who appears for the applicant, has raised before us several interesting questions as to the validity of the Bombay Prevention of Bigamous Marriage Act, 1946. This Act of 1946 applies to Hindus and S. 4 declares a bigamous marriage to be void notwithstanding any law, custom or usage to the contrary, and by S. 5 the contracting of a bigamous marriage is constituted an offence and is deemed to be an offence under S. 494, Penal Code. Sections 6 and 7 are penal sections which penalise the solemnising of a bigamous marriage and provides a penalty for persons having charge of a minor concerned in a bigamous marriage. Section 8 provides for the forum and states that no Court other than that of a Presidency Magistrate or a Magistrate of the First Class shall take cognisance of and try any offence punishable under S. 6 or 7 of the Act, and S. 9 makes offences under the Act cognisable.

[4] This Act was passed by the Provincial Legislature and the Provincial Legislature was competent to enact this legislation inasmuch as the subject of marriage and divorce falls in item 6 of List III in Sch. VI. That is a list which deals with subjects with regard to which both the Central and the Provincial Legislature can legislate. But Mr. Rege's contention is that although the Provincial Legislature was competent to pass this Act, this Act is void inasmuch as it is repugnant to an existing Indian law and the argument is put in this way. Under Hindu law bigamous marriages are permitted. They are not only not void but they are perfectly valid. Inasmuch as the Provincial Legislature by passing the Act has rendered bigamous marriages void, that provision is repugnant to the existing Hindu law and to the extent of that repugnancy the Act passed by the Provincial Legislature is void and of no effect.

[5] Section 107, Government of India Act deals with inconsistency between Federal or Central laws and Provincial laws and sub-s. (1) provides that if a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List, then the existing Indian law shall prevail and the Provincial law shall, to the extent of the repugnancy, be void. But sub-s. (2) provides a saving clause and that lays down that if the assent of the Governor-General has been received to a Provincial Act which deals with a subject in a Concurrent List, then the Provincial law shall prevail notwithstanding its repugnancy to the existing Indian law. It is common ground here that the assent of the Governor-General was not received to this Act and, therefore, Mr. Rege is right that if he satisfies us that this legislation is repugnant to any existing Indian law, then to the extent of the repugnancy this Act must be held to be void.

[6] Now, "existing Indian law" is defined by S. 311, Government of India Act and the definition is this:

"Existing Indian law" means any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of Part III of this Act by any Legislature, authority or person in any territories for the time being comprised in British India, being a legislative authority or person having power to make such a law, ordinance, order, bye-law, rule or regulation."

[7] The question that we have to determine is whether Hindu law is a law passed or made by any Legislature, authority or person. There can be no doubt that Hindu law is law, but the question that arises is whether it is a law that has been passed or made by any Legislature, authority or person as contemplated by the definition of this phrase in S. 311, Government of

India Act. Mr. Rege contends that Hindu law is administered in the High Court and in the civil Courts in the Province by reason of the fact that it was accepted or adopted by the British Government. It is true that there are enactments Parliamentary or Indian, which direct that Hindu law should be applied in administering justice in the High Court and in the Provincial civil Courts; for instance, it is by reason of the Government of India Act that Hindu law is applied in the High Court. It is by S. 26 of Bombay Regulation, IV of 1827 that Hindu law is applied in the civil Courts in the Province. But because Hindu law is applied in the administration of justice by directions of a competent Legislature, it does not follow that Hindu law was passed or made by a Legislature. It is impossible to accept the contention of Mr. Rege that we must read "passed" in this section to mean "approved or adopted by the Government." "Passed" in this context can only mean as "having received the sanction or imprimatur of the Legislature or of legislative authority" and Hindu law was the law of this country as far as its Hindu residents were concerned long long ago before the advent of the British into this country. All that the British did was to accept the law, to approve of it or to adopt it and to direct that that law shall be applied in the Courts of law when the parties were of that particular persuasion. But the British had no hand whatever in passing or making Hindu law. As I said, it already existed and was in force long before the British appeared on the scene. Therefore, Mr. Rege is not right when he says that this Act is repugnant to an existing Indian law. It may be that it is repugnant to Hindu law. But it is perfectly competent to the Provincial Legislature to amend or modify Hindu law if it does with regard to a matter which falls within either List II or List III. As far as marriage and divorce is concerned, the power is given both to the Central and the Provincial Legislature to legislate about that subject and the Provincial Legislature has the right to modify the Hindu law to the extent that it applies in the Province of Bombay.

[8] The next point urged by Mr. Rege is that this prosecution was launched without any complaint having been made by the aggrieved party as required by S. 198, Criminal P. C. 1898. We have held in *Emperor v. Manju Hanumant Naik*, 50 Bom. L. R. 379 : (A. I. R. (35) 1948 Bom. 374) that by reason of S. 9 which makes offences under the Act cognisable the complaint of the aggrieved party required by S. 198 is no longer necessary for the initiation of the prosecution.

[9] The next point urged by Mr. Rege is that as the sentence for an offence created under this Act is seven years' rigorous imprisonment, under

Sch. 2, Criminal P. C. the proper forum for trying the case is the Court of Session and not a First Class Magistrate. In Sch. 2, Criminal P. C., it is provided under the heading "Offences against other laws" that if those offences are punishable with death, transportation or imprisonment for seven years or upwards it is the Court of Session that has to try the case. But in our opinion this is not an offence against "other law" but it is an offence which has been made an offence under the Penal Code itself. While it is true that S. 5 creates a new offence, in terms it states that the offence shall be deemed to be an offence under S. 494, Penal Code. No penalty is provided under the Act itself, and as it has been made penal under S. 494, one has to turn to S. 494 to find out what the penalty for the offence is. It is difficult to see why, if for the purpose of the penalty one has to turn to S. 494, we should not turn to S. 494 also for the purpose of determining what the proper forum for the trial of the offence is, and there is no doubt that as far as S. 494 is concerned, the proper forum is not necessarily the Court of Session but it may be a Presidency Magistrate or a Magistrate of the First Class. As I see it, the Legislature having created this new offence intended that all the provisions of S. 494 should apply to this newly created offence except those which were in terms altered by the Act itself, one for instance being that the offence is made cognisable and not subject to any complaint made by the aggrieved party under S. 198.

[10] The last point urged by Mr. Rege is that no *prima facie* case was made out before a charge was framed and before the plea of the accused was taken. It is important to note that in this case all the four accused pleaded guilty to the charge of having committed an offence under this Act. This point was not raised in the Court of appeal below and really Mr. Rege is asking us to look into the evidence to find out whether a *prima facie* case was made out or not before the charge was framed. That is not the proper function of the Court exercising its revisional powers. Apart from that, even assuming Mr. Rege was right inasmuch as the accused have pleaded guilty to the charge, the framing of the charge before a proper *prima facie* case was made out would at the most be an irregularity which in this case certainly did not prejudice the accused. Nor did it lead to any injustice. The position might have been different if the accused had pleaded not guilty and the case had gone to a trial, but inasmuch as the plea of guilty was recorded and no further evidence was led, there is no substance in this complaint of Mr. Rege.

[11] I might say that the learned Resident

Magistrate has written a very well-considered judgment on questions which do not usually come before criminal Courts and has shown considerable grasp of the law on the subject and of various interesting and complicated questions that arose before him and which he had to determine. The revisional application must fail and the rule is discharged.

D.H.

Rule discharged.

A. I. R. (36) 1949 Bombay 73 [C. N. 20.]

DESAI J.

Usha Durgaprasad Bakhale—Petitioner v. Commissioner of Police—Respondent.

Crown Side Petition of 1947, Decided on 20th November 1947.

Bombay Public Security Measures Act (VI [6] of 1947), S. 21—Provincial Government not bound to specify circumstances of delegation of power nor bound to impose and set out conditions of exercise of power.

It is an absolute power which the Provincial Government has got to delegate, and it may but is not bound to specify circumstances under which the power is delegated and it may but is not bound to impose and set out the conditions under which the power may be exercised. [Para 2]

*M. N. Talpade—*for Petitioner.

*C. K. Daphtary, Advocate General—*for Respondent.

Order.—The petitioner in this case is the wife of one Durgaprasad Prasannakumar Bakhale. The respondent is the Commissioner of Police, Bombay. The petition states that the respondent got the said Durgaprasad Prasannakumar Bakhale arrested on 9th September 1947, when the house of the said Durgaprasad was searched, but nothing objectionable was found by the police in the house. Nevertheless the respondent detained the said Durgaprasad at the Esplanade police lock-up and on 11th September 1947, the said Durgaprasad was served with a notice dated 11th September 1947, under S. 3, Bombay Public Security Measures Act of 1947 and that he has now been detained at the Worli Temporary Prison under Order No. 486 of 1947 purporting to have been issued by the respondent under the said Act. The notice dated 11th September 1947, which was served on Durgaprasad reads as follows :

"That you have instigated and actively helped by providing funds to suspect Laxman and his accomplices for the purpose of stabbing Muslims in Kamatipura area and are concerned in stabbing incidents, bomb throwing incidents in Kamatipura area either as an instigator, active helper or actual perpetrator or financier and are thereby acting in a manner prejudicial to the public safety and the peace of Greater Bombay."

The petitioner denies all these allegations and sets out the activities useful and innocent in which her husband was engaged. In para. 5 of the petition it is stated that it appears that Durgaprasad was arrested in consequence of a

statement made by the suspect Laxman. The petitioner submits that the statement of the accused person Laxman cannot justify the respondent in taking action against Durgaprasad under the Bombay Public Security Measures Act and she submits that the order was made on incorrect facts and false information. In para. 8 of the petition it is submitted that the order made against Durgaprasad by the respondent was illegal, void and of no legal effect and that the same was not made bona fide in proper exercise of his duty by the respondent. The petitioner prays that the respondent may be ordered to produce Durgaprasad before this Court (which has accordingly been done) and that Durgaprasad be set at liberty.

[2] To-day (20th November 1947), the matter has been argued by Mr. M. N. Talpade on behalf of the petitioner. The first point that he made was that the order of the Government of Bombay published in the *Bombay Government Gazette* on 26th April 1947, delegating the power under S. 2, sub-ss. (1), (2) and (4), to the Commissioner of Police, Bombay, is not a proper order. He relies on S. 21, Bombay Public Security Measures Act of 1947 which provides as follows :

"The Provincial Government may by order direct that any power or duty, which is conferred or imposed on the Provincial Government, shall in such circumstances and under such conditions, if any, as may be specified in the order, be exercised or discharged by any officer or authority subordinate to it, not lower in rank than a Deputy Commissioner of Police in Greater Bombay, or the District Magistrate, or Additional District Magistrate elsewhere."

Section 2 (1) says :

"The Provincial Government may, if it is satisfied that any person is acting in a manner prejudicial to the public safety, the maintenance of public order, or the tranquillity of the Province or any part thereof, make an order directing that he be detained, etc."

Now the point that Mr. Talpade is making on S. 21 is that the order made by the Government of Bombay delegating its powers under S. 21 to the Commissioner of Police does not specify the circumstances and the conditions under which the power was delegated. On a bare reading of S. 21, it is clear that it is an absolute power which the Provincial Government has got to delegate, and that it may but is not bound to specify circumstances under which the power is delegated, and it may but it is not bound to impose and set out the conditions under which the power may be exercised. I should point out that this point was not taken in terms by the petitioner in her petition. In my opinion it was necessary to set out this contention in the petition if it was intended to urge it at the hearing, and the allegations which are made in para. 8 of the petition are far too general in terms to allow this contention and the other contentions which I shall

now refer to, to be urged. The Advocate-General, however, was good enough to allow the point to be urged and I accordingly considered it and arrived at the conclusion mentioned above.

[3] So far as S. 2 (1) is concerned, Mr. Talpade relies on the words "any person is acting in a manner prejudicial to the public safety." His argument is that the order of 11th September 1947, mentioned a thing which happened in the past, namely, that the detenu had instigated and actively helped by providing funds and weapons to suspect Laxman and his accomplices. Mr. Talpade told me that that was an event which took place in the past about some months before the date of the order. The learned Advocate-General was not prepared to accept the correctness of that statement. In my opinion if it was the intention of the petitioner to show that the help given to Laxman was so remote in point of time as to make it an event which the Commissioner of Police should in no circumstances have allowed to affect his judgment, then it was necessary for the petitioner to set out in terms that fact. The Advocate-General, however, points out that this incident is not the only thing which influenced the decision of the Commissioner of Police. The order proceeds to say :

"And are concerned in stabbing incidents and bomb throwing incidents in Kamatipura area, etc., and are thereby acting in a manner prejudicial to the public safety and the peace of Greater Bombay."

I asked Mr. Talpade whether his contention was that it is a condition precedent to the exercise of the power that the person "is acting" at the very moment the order is made. Mr. Talpade was not prepared to push his argument to that extent. In my opinion the petitioner's contention in this behalf is not well-founded in law. In any event the other part of the order shows that no objection could be sustained as to its validity.

[4] The other point that was raised by the learned counsel appearing for the petitioner is that the exercise of the power by the Commissioner of Police is an abuse of his authority. Now it is true that in para. 8 of the petition it is stated that the order was not made bona fide in the proper exercise of his duties by the respondent. No particulars are given in support of that statement, and I am inclined to think that for want of particulars, as in the case of fraud where no particulars also are given, that allegation must be treated as non-existent. If it is suggested that the Commissioner of Police was influenced only by the statement made by Laxman, that is not correct as is obvious on a perusal of the terms of the order dated 11th September 1947. It was stated that in fact at this time there were no stabbing incidents. That statement of fact should have found its place in the petition if it

was intended to rely on it. I have no material before me to accept that statement as correct.

[5] These being the only points urged in support of the application, I am afraid that I have no material before me to enable me to hold that the order dated 11th September 1947 which, on the face of it, appears to be a valid order, is an abuse of the authority conferred on the Commissioner of Police. I hold that the order was properly made by a person having the necessary authority in that behalf and that it is a valid and binding order. Under the circumstances I dismiss the petition. There will be no order as to costs.

D.H.

Petition dismissed.

A. I. R. (36) 1949 Bombay 75 [C. N. 21.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

In re Shoilen Dey—Detenu—Applicant.

Criminal Appln. No. 891 of 1948, Decided on 25th June 1948.

Bombay Public Security Measures Act (VI [6] of 1947), S. 3—Grounds supplied should disclose state of mind of detaining authority and show that it had applied its mind with diligence—Detenu charged with inciting labourers of Tata Air India, Bombay—No such company found in existence—Tatas having interest in many air companies—No indication as to which company was meant—Error held material and showed want of due care and caution on part of authority.

The detaining authority has such wide powers given to it under the Act that where the Court is left with any discretion at all to investigate the ground given by the Commissioner of Police, the Court must do so vigilantly in order to find out whether that degree of care and caution has been exercised by the detaining authority which the law requires. The Commissioner of Police need give no particulars, need state no facts. He can take refuge behind public interest and behind the language of Ss. 2 and 3. But when he does give grounds—and those grounds have to be given by him as a statutory obligation—he must take meticulous care to see that whatever is stated in those grounds is stated with absolute accuracy. The emphasis is not so much on the accuracy, or on the nature or extent of the error; the emphasis is on the state of the mind of the detaining authority. If the state of the mind of the detaining authority discloses that he has been casual in his approach and that he has not applied his mind with that diligence which it is necessary when the question is of taking away the liberty of a subject, the Court will certainly interfere and will set at liberty the detenu arrested by the order of the detaining authority. [Para 1]

Where the ground supplied to the detenu under S. 3 for his detention was that he was inciting a section of labourers of Tata Air India, Bombay, and it was found that there was no company as Tata Air India but Air India, Ltd. which did not belong to the Tatas and that the Tatas had interest in more than one air company, but there was no indication as to which company was meant:

Held that apart from the question of prejudice to the detenu, the error which was not trivial, showed want of due care and caution on the part of the detaining

authority and that therefore the detenu was entitled to be released. [Para 1]

*S. A. Neemuchwala—*for Applicant.

S. G. Patwardhan, Government Pleader—

for the Crown.

Chagla C. J.—The detenu in this case was detained for the reason which was furnished to him by the Police Commissioner on 7th April 1948, that he was inciting a section of labourers of Tata Air India, Bombay, to use violence against the officers of Tata Air India, and that he was also inciting this section of workers to acts of sabotage. Now, it is a patent fact which has not been disputed by the Commissioner of Police in his affidavit that there is no such company in existence as "Tata Air India." What the Police Commissioner was meaning, according to him, was the Air India, Ltd., and he very naively says in his affidavit that he used the expression "Tata Air India, Bombay" because according to him the Air India Ltd., belongs to Tatas. That again is an incorrect statement. Air India, Ltd. does not belong to Tatas, it does not belong to anyone. It is a limited company and it belongs to shareholders of that company. Now, the Government Pleader has urged that the Commissioner of Police has described Air India, Ltd., popularly, and, if at all, the error is very slight. It has caused no prejudice to the detenu, and the detenu knew exactly what was being intended. In the first place, we are not at all sure that the detenu knew or understood what was the company intended by the Commissioner of Police. The Tatas are interested in more than one air company in India, and to describe the company as Tata Air India does not necessarily lead to the inference that the company intended by the Commissioner of Police was the Air India, Ltd. Apart from that a much more important question of principle is at stake. The detaining authority, as we have had occasion to point out several times, has such wide powers given to it under the statute that where the Court is left with any discretion at all to investigate the grounds given by the Commissioner of Police, the Court must do so vigilantly in order to find out whether that degree of care and caution has been exercised by the detaining authority which the law requires. The Commissioner of Police need give no particulars, need state no facts. He can take refuge behind public interest and behind the language of Ss. 2 and 3. But when he does give grounds—and those grounds have to be given by him as a statutory obligation—he must take meticulous care to see that whatever is stated in those grounds is stated with absolute accuracy. The emphasis is not so much on the accuracy, or on the nature or extent of the error; the emphasis is on the state of the mind of the detaining authority. If the state of the mind of the detaining authority

discloses that he has been casual in his approach and that he has not applied his mind with that diligence which it is necessary when you are taking away the liberty of a subject, the Court will certainly interfere and will set at liberty the detenu arrested by the order of the detaining authority. In this case we are satisfied that there is an error. The error is by no means trivial and it shows want of due care and caution on the part of the detaining authority.

[2] The rule will, therefore, be made absolute with costs. The detenu to be released immediately.

R.G.D.

Rule made absolute.

A. I. R. (36) 1949 Bombay 76 [C. N. 22.]

JAHAGIRDAR J.

Bhaskar Sadashiv Joshi — Applicant v. Registrar, Bombay Public Trust Registration Act, 1935 — Opponent.

Civil Revn. Appln. No. 332 of 1947, Decided on 26th February 1948.

Bombay Public Trusts Registration Act (XXV [25] of 1935) — Society registered under Societies Registration Act, need not be registered under Bombay Act (XXV [25] of 1935).

A society which is registered under the Societies Registration Act is exempt from the operation of the Bombay Public Trusts Registration Act: A.I.R. (28) 1941 Bom. 312 and A. I. R. (33) 1946 Bom. 516, *Ref.* [Para 9]

The object of the Bombay Act is to ensure the better management of public trusts of a religious or charitable nature. The object is already served in case of Societies registered under the Societies Registration Act. It cannot be the intention of the Legislature to bring them within the scope of the Bombay Act. [Paras 4 and 7]

V. J. Gharpure — for Applicant.

Order. — This is a revision application made by the manager of the Nasik branch of the Anatha Vidyarthi Griha, Poona, against the order of the Registrar appointed under the Public Trusts Registration Act (XXV [25] of 1935), requiring him to register the institution. The facts are that on 13th December 1944, the Civil Judge, Senior Division, Nasik, who is also the Registrar under S. 4 of Bombay Act (XXV [25] of 1935), issued a notice against the applicant to show cause why action should not be taken against him for non-compliance with the requisition published in *Lokasatta* on 13th December 1944. The applicant on 25th February 1947, appeared before the Registrar and contended that the Anatha Vidyarthi Griha was an association registered as a society under the Societies Registration Act (XXI [21] of 1860), the object of which was to work for the education, maintenance and welfare of poor and deserving Hindu students with a view, mainly to make them useful public workers, and that it was not a religious trust as contemplated in S. 3, cl. (3), and that it could not be treated as a public trust under the Act and

that therefore it was not liable to be registered under the Act. He also contended that it is not shown that the Nasik branch had independent existence and that its income is more than Rs. 1,000 per year. The learned Registrar, however, held

"that the Institute is for the public welfare and the fund is raised from the public. Hence it is a public branch registerable under the Public Trusts Registration Act and hence the trustees and the manager be called upon to have the registration made."

Against this order the applicant has come in revision.

[2] The main contention of Mr. Gharpure, the learned advocate for the applicant, is that the societies registered under the Societies Registration Act are exempt from the operation of the Bombay Public Trusts Registration Act. This point is not covered by any authorities. This is for the first time that a society registered under the Societies Registration Act is sought to be brought under the purview of the Bombay Public Trusts Registration Act. It is, therefore, necessary to examine this argument more closely.

[3] The preamble of the Bombay Public Trusts Registration Act states :

"Whereas it is expedient to provide for the registration of trusts created or existing for a public purpose of a religious or charitable nature and for the audit and filing of accounts of such trusts with a view to ensuring the better management thereof etc."

[4] The object of this Act is therefore to ensure the better management of public trusts of a religious or charitable nature by providing for registration thereof and for the audit and filing of accounts.

[5] The contention of Mr. Gharpure is that the Anatha Vidyarthi Griha is not a public trust of a religious or charitable nature. It has got its own constitution and its administration is carried on by the council in accordance with the rules and in conformity with the aims and objects of the society. Under R. 10 of its constitution :

"all properties, whether moveable or immoveable of any sort or kind of the society, shall belong to the society, in its corporate character and no member in his individual capacity shall have any right to them or to any portion of them."

Apart from the rules of this society, S. 5, Societies Registration Act itself provides that the property, moveable and immoveable, belonging to a society registered under the Act, if not vested in trustees, shall be deemed to be vested, for the time being, in the governing body of such society and in all proceedings, civil and criminal, may be described as the property of the governing body of such society by their proper title. It is thus clear that the society registered under the Act is the full owner of all its property and funds and there is therefore no reason why such a

society requires to be dealt with under the Bombay Public Trusts Registration Act.

[6] In *Krishnan v. Sundaram*, 43 Bom. L. R. 562 : (A. I. R. (28) 1941 Bom. 312) it has been held that the position of a society registered under the Societies Registration Act is like that of a club or a joint stock company. In that case, the learned Judge applied the principles of company law to the case of a society registered under the Societies Registration Act. This principle was accepted and followed in *Satyavrat Sidhantalankar v. Arya Samaj*, 48 Bom. L. R. 341 : (A. I. R. (33) 1946 Bom. 516). There the learned Judge has observed (p. 347) :

"I am of opinion that by reason of the provisions of the Societies Registration Act, once the society is registered with the Registrar of Joint Stock Companies, by filing a memorandum and certified copy of the rules and regulations . . . the society enjoys the status of a legal entity apart from the members constituting the same and is capable of suing or being sued."

And again on p. 351 the learned Judge observes:

"The society is neither a corporation nor a limited company incorporated under the Indian Companies Act. It is a registered society of individuals, which has acquired a legal status by reason of its registration with the Registrar of Joint Stock Companies under the provisions of the Societies Registration Act . . . The rule of majority is the normal basis of these associations. I am therefore of opinion that the principles governing the members of joint stock companies are the principles which are applicable in the case of a society registered under the Societies Registration Act."

[7] If the position of societies registered under the Societies Registration Act is like that of a club or a joint stock company, there is no reason why there should be an outside interference in its internal management. The rules of the societies usually provide for a machinery for a proper and efficient management of their properties. They can sue and be sued, and if there be any irregularity or illegality in the disposal of its funds, it is always open to the aggrieved party to file a suit against the society for appropriate reliefs and get redress. Obviously it appears to me that as the Legislature has already provided for the registration of such societies under the Societies Registration Act, it cannot be the intention of the Legislature to bring them within the scope of the Bombay Public Trusts Registration Act which applies to public trusts created or existing for public purposes of a religious or a charitable nature.

[8] I am fortified in this view by the fact that there is no case up till now—so I am told—of any society registered under the Societies Registration Act, being called upon to get it registered under the Bombay Public Trusts Registration Act. The Anatha Vidyarthi Griha has its head office at Poona. It is not registered under the Bombay Public Trusts Registration Act. Nor have the several educational societies in this

Province registered under the Societies Registration Act been called upon to get themselves registered under the Bombay Public Trusts Registration Act.

[9] I, therefore, hold that this society which is registered under the Societies Registration Act is exempt from the operation of the Bombay Public Trusts Registration Act. The order made by the Registrar dated 14th March 1947, requiring the trustees and manager to have the association at Nasik registered under the Bombay Public Trusts Registration Act is set aside. The rule is, therefore, made absolute. There will be no order as to costs.

R.G.D.

Rule made absolute.

A. I. R. (36) 1949 Bombay 77 [C. N. 23.]

MACKLIN AND BAVDEKAR JJ.

*Nawalmal Chaturbhuj — Plaintiff —
Appellant v. Dagaduram Ramnarayan —
Defendant — Respondent.*

First Appeal No. 21 of 1943, Decided on 23rd September 1946, from order of Civil Judge, Ahmednagar, in Darkhast No. 1303 of 1939.

(a) Dekkhan Agriculturists' Relief Act (1879), S. 22 — Civil Manual (Bom.), Vol. 1, R. 95 — Sale by Collector — Notification relating to Ahmednagar District—Sale ordered not by decree but by executing Court—Notification has no application — Sale must be held by Court.

In order that the sale of property be held by the Collector under the Government Notification relating to Ahmednagar District, printed under R. 95, Vol. 1 of Civil Manual, the decree itself must order the sale of the property, and the person whose property is to be sold must be an agriculturist at the critical date, which is the date of the order for sale : A. I. R. (28) 1941 Bom. 186, *Ref.*

[Para 2]

The mortgage decree directed the payment of the decretal amount in instalments. It further directed that in the event of the defendant failing to pay any two instalments in time, the plaintiff, if he so wished, should sell the mortgaged property in suit and recover the whole amount then due in one sum. On the defendant's default, the decree-holder took out execution. The Court directed the sale of the property :

Held, that the sale was not directed by the decree and that the notification therefore did not apply. The sale could not be held by the Collector but must be held by the Court.

[Para 2]

(b) Dekkhan Agriculturists' Relief Act (1879), S. 22 — "Agriculturist" — Person not "agriculturist" at date of decree but "agriculturist" at date of execution can take benefit of section (*Obiter*) : A. I. R. (28) 1941 Bom. 186, *Ref.*

[Para 2]

J. C. Shah and N. C. Shah—for Appellant.

J. G. Rele—for Respondent.

Macklin J.—This execution appeal raises the question of the right of a person who is an agriculturist at the date of the execution but was not an agriculturist at the date of the decree to have his property sold by the Collector rather than by the Court. The decree under execution was a decree for the payment of a mortgage

debt by instalments; and it directed that, in the event of the defendant failing to pay any two instalments in time, the plaintiff, if he so wished, should sell the mortgaged property in suit and recover the whole amount then due in one sum. The executing Court has presumed that the defendant is entitled to plead his agricultural status at the time of the execution, and it has held that he has in fact proved it; and on that ground the Court has ordered that the mortgaged property be sold and the sale be held by the Collector. But the point taken by the decree-holder in this appeal, apart from the merits of the decision that the defendant was an agriculturist at the date of the execution (as to which I do not propose to say anything), is that the only provision of law by which property that has to be sold must be sold by the Collector is one of the four Government notifications relating to Poona, Satara, Sholapur and Ahmednagar Districts printed under S. 95 at p. 87 of vol. 1 of the Civil Manual headed "Execution by the Collector." The present execution comes from the Ahmednagar Court and the terms of the notification have to be followed if the notification applies.

[2] Section 22, Dekkhan Agriculturists' Relief Act prohibits a Court from attaching and selling the immovable property of an agriculturist unless the property has been specifically mortgaged for the debt to which the decree relates. It is open to an agriculturist to take the benefit of that section even if he was not an agriculturist at the date of the decree; it is enough if he is an agriculturist at the date of the execution: see *Vishvanath Vithalsa v. Balaram Anandram*, 43 Bom. L. R. 325 : (A I.R. (23) 1941 Bom. 186) which was a case where there was an attachment in the suit which was intended to be followed, and was in fact followed, by an order for sale passed in execution. But the question here is not whether the property is to be sold at all but whether it is to be sold by the Collector rather than by the Court; and the only authority which requires it to be sold by the Collector rather than by the Court is the series of notifications to which I have referred. The material order in those notifications so far as this present execution is concerned is that in the District of Ahmednagar it is only the Collector who may execute decrees ordering the sale of any immovable property belonging to a person who is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, which has been specifically mortgaged for the repayment of the debt to which any such decree relates. If the decree does in fact order the sale of the property, then execution must be transferred to the Collector if this notification applies. But two things are clear; (1) that the notification will not apply unless the decree itself orders the

sale of the property, and (2) that "property belonging to a person who is an agriculturist" on the authority of the case cited would mean property belonging to a person who is an agriculturist at the critical date, which is the date of the order for sale.

[3] On behalf of the judgment-debtor Mr. Rele argued that it was not so much the decree that ordered sale of the property as the order for sale passed in execution; but that at once puts him out of Court, because in that case the notification will not apply and there is no other provision which would require the sale to be held by the Collector once it has been ordered by the Court.

[4] Mr. Rele attempts to get out of the difficulty by suggesting that on the assumption of the decree ordering sale there is nevertheless a further order for sale passed in execution proceedings on the application of the decree-holder, just as in the case cited there was an attachment in the suit intended to be followed, and actually followed, by an order that the attached property be sold, which last order was passed in execution. The argument in short is that we have two critical dates in this case—the date of the decree giving jurisdiction to the Collector, and the date of the order in execution for sale giving the judgment-debtor the right to plead agricultural status even at this stage. But in our view it is meaningless for there to be two orders for sale; unless some order cancelling the former order for sale has intervened, the subsequent order for sale can be no more than a confirmation of the previous order,—nothing more in effect than an order directing that the property which was already ordered to be sold should be put up for sale in the ordinary way. The dilemma therefore is that if the decree orders sale, then the order for sale passed in execution is merely an order for confirmation and not such a separate order for sale as would give the judgment-debtor a right to plead agricultural status as at the date of the execution. On the other hand, if the decree does not order sale, then the Government Notification directing the sale to be held by the Collector does not apply. The dilemma remains unresolved, and this appeal must be allowed. The sale must be held by the Court. The judgment-debtor will pay the costs of the appeal.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Bombay 79 [C. N. 24.]

CHAGLA AG. C. J.

Shankar Ramkrishna Dandekar — Appellant v. Daga Tanaji Mali — Respondent.

Second Appeal No. 21 of 1946, Decided on 31st October 1947, from order of Dist. Judge, Dhulia, in Appeal No. 200 of 1945.

Civil P. C. (1908), S. 11—Execution proceedings—Constructive *res judicata*—Notice under O. 21, R. 66—Judgment-debtor not appearing—Proclamation ordered to issue—Date of sale fixed—Judgment-debtor appearing on such date—Plea that he was agriculturist and that he should be allowed to pay decretal amount in instalments—Plea held barred.

Upon presentation of a darkhast for execution of a final mortgage decree, notice under O. 21, R. 66 was issued to the judgment-debtor. The judgment-debtor failed to appear and a proclamation was ordered to issue and the sale was fixed for a certain date. On that date the judgment-debtor appeared and applied to the Court that being an agriculturist within the meaning of the Dekkhan Agriculturists Relief Act, he should be allowed to satisfy the decree in instalments :

Held, that the plea was barred on the principle of constructive *res judicata*. By his failure to appear upon the notice under O. 21, R. 66, the judgment-debtor allowed the Court to make the order which it did : A.I.R. (26) 1939 Bom. 526, *Rel. on* ; A. I. R. (13) 1926 Bom. 246, *Disting.* ; A. I. R. (11) 1924 Bom. 305, *Ref.* [Para 2]

Annotation : ('44 Com.) Civil P. C., S. 11 N. 35.

G. S. Gupte — for Appellant.

Judgment.—This appeal arises in execution proceedings. The appellant obtained a preliminary mortgage decree on 27th February 1943, and he obtained a final decree on 21st June 1944. On 6th December 1944, he presented a darkhast for execution of his decree. Notice was issued to the judgment-debtor under O. 21, R. 66, on 12th January 1945. The judgment-debtor failed to appear in answer to the notice and a proclamation was ordered to issue on 6th April 1945, and the sale was fixed on 17th December 1945. On that date, the judgment-debtor appeared and applied to the Court that being an agriculturist he should be allowed to satisfy the decree by paying instalments. The executing Court took the view that it was not open to the judgment-debtor to raise a contention about his status at that stage of the proceedings and he dismissed the application of the judgment-debtor. In appeal the learned District Judge took the contrary view. The learned District Judge has relied on two decisions of this Court. One is *Rudrappa v. Chanbasappa*, 26 Bom. L. R. 153 : (A. I. R. (11) 1924 Bom. 305). In that case the defendant was not described as an agriculturist in the decree and the learned District Judge took the view that it was not open to the executing Court to investigate into the status of the judgment-debtor when the decree did not describe him as an agriculturist. Sir Norman Macleod C. J.

and Crump J. differed from that view and came to the conclusion that it was open to a judgment-debtor to establish that he was an agriculturist at the date of the passing of the decree in execution proceedings, although the decree did not describe him as such. The principle of this case was extended in *Narayan v. Dhondo*, 28 Bom. L. R. 305 : (A. I. R. (13) 1926 Bom. 246). In that case in earlier execution proceedings the judgment-debtor had not taken up the contention that he was an agriculturist and Sir Norman Macleod C. J. and Coyajee J. held that notwithstanding his failure to put forward that contention in earlier proceedings it was open to him to raise a plea as to his status in a subsequent execution proceeding.

[2] Then we come to the decision of Lokur J. in *Mahadeo Sunder v. Khanderao Sitaram*, 41 Bom. L. R. 1166 : (A. I. R. (26) 1939 Bom. 526). In that case the facts were very similar to the facts I have before me. There too the judgment-debtor failed to appear on receiving a notice issued to him under O. 21, R. 66, and after the terms of the proclamation for sale were settled by the Court he made an application asking for a fresh *panchnama* and a fresh valuation of the property to be sold. That application was granted and a fresh proclamation was issued and then he made an application stating that he was an agriculturist and asking for the proceedings to be transferred to the Collector, and Lokur J. held that the judgment-debtor had accepted the order passed by the executing Court with regard to the sale of the property and it was not open to him subsequently to put forward the contention that he was an agriculturist. It seems to me that the principle of that decision also applies to the case here. The principle is really based on constructive *res judicata*. It was open to the judgment-debtor when the notice under O. 21, R. 66, was issued to him to plead his status. He failed to do so and allowed the Court to make the order with regard to the issue of the proclamation and fixing the date for the sale. In doing so, he brought into operation the principle of constructive *res judicata* and, therefore, when he applied after the date of the sale was fixed that his status should be investigated, that application to my mind was barred.

[3] The decision in *Narayan v. Dhondo*, 28 Bom. L. R. 305 : (A. I. R. (13) 1926 Bom. 246), is entirely different. When you have several darkhasts presented and there are several execution proceedings, it may be that a judgment-debtor may not contest the earlier ones, but that would not deprive him of the right to avail himself of the benefit given to him under the Dekkhan Agriculturists' Relief Act in a subsequent execution proceeding. But when we are dealing with the

same execution proceedings after a judgment-debtor, who has had the opportunity of putting forward the contention that he was an agriculturist at an earlier stage of the proceedings, fails to do so and stands by, it is not open to him at a later stage to raise that contention and practically compel the Court to scrap the proceedings already taken and nullify orders already passed. In my opinion, therefore, the lower appellate Court was wrong in coming to the conclusion that it did.

[4] The appeal will, therefore, be allowed and the order of the lower appellate Court set aside and the order made by the executing Court restored. No order as to costs of this appeal.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Bombay 80 [C. N. 25.]

COYAJEE J.

Maganlalji Gordhanlalji — Plaintiff v. Purshottamlalji Wagheshlalji—Defendant.

O. C. J. Suit No. 2092 of 1936, Decided on 4th February 1948.

Hindu Law — Widow — Adverse possession — Widow in possession as limited heir—She cannot hold property adversely to reversioners and claim it as her stridhan—Limitation Act (1908), Art. 144.

Where a Hindu widow enters into possession of the estate of her deceased husband in her capacity as limited heir she can hold any part of it adversely to third parties and therefore in the interests of the real reversioner or reversioners. Entering upon the estate in that limited capacity and holding such limited estate, she cannot enlarge it against the reversioner and hold it so as to make it part of her stridhan: I. L. R. (1944) All. 533, *Foll.*; I. L. R. (1943) All. 230, *Rel. on*; A. I. R. (11) 1924 P. C. 121, *Ref.* [Paras 11, 12]

Where a Hindu died leaving a widow and a son and the widow took possession of a part of her husband's estate in her character as Hindu widow:

Held, that she could not prescribe for an absolute estate against the son. [Para 14]

Annotation: ('42-Com.) Lim. Act, Arts. 142 and 144, N. 19.

V. F. Taraporewalla and K. M. Vakil—

for Plaintiff.

S. V. Gupte and Sir Jamshedji Kanga—

for Defendant.

Judgment.—This matter is placed before me at the direction of the Court of Appeal pursuant to a remand made in this matter by their Lordships of the Privy Council.

[2] The facts of the case are set out in my judgment dated 9th April 1943. In that judgment I held that a parcel of the Tapti Valley Railway Company, Ltd., shares were held by Shri Rukshmani Vahuji as part of the estate of Shri Narsinghlalji Maharaj, and that the said shares formed part of the joint family property in her possession. On a consideration of facts in that case arising on the evidence adduced before me I arrived at the conclusion that in those particular circumstances the said shares belonged to the

reversioner, the plaintiff in the suit, and I passed a decree in his favour for the payment of an amount equivalent to the value of the shares together with interest thereon.

[3] As I came to that conclusion I indicated that no question of adverse possession and of limitation survived for a decision.

[4] I had observed for reasons sufficiently set out in that judgment that it may be open in certain circumstances for a widow in possession of the joint family property to plead adverse possession and limitation against the reversioner and relied for that purpose on the case of *Lajwanti v. Safa Chand*, 51 I. A. 171: (A. I. R. (11) 1924 P. C. 121).

[5] The Court of Appeal held that the claim of the sale proceeds of those shares was not within the scope of the action; they further held that the suit was barred by the law of limitation. The Court of Appeal, thereupon, decided the appeal without going into the merits of the dispute and without expressing any view on the question whether a Hindu widow could, whilst wrongfully claiming part of the joint family property, hold it adversely to other members of the family particularly in regard to limitation. The Court of Appeal, therefore, allowed the appeal and dismissed the suit.

[6] The plaintiff preferred an appeal to the Privy Council. Their Lordships held that the case made out before the trial Court was sufficiently pleaded in the plaint. They reversed the decree of the Court of Appeal and remanded the case for disposal to the Court of Appeal observing as follows:

"Their Lordships think that it is not desirable that they should decide this matter until it has been properly investigated by the Courts of India and they are in possession of the views of the Court of Appeal as well as of the trial Judge."

[7] In these circumstances the Court of Appeal has remitted the matter to me inasmuch as their Lordships used the expression "views of the Court of Appeal as well as of the trial Judge."

[8] As stated above, my view was expressed in my judgment as set out by me above, and counsel appearing for the plaintiff as well as the defendants submitted that no further observations were required in those circumstances from the Court of the first instance.

[9] In deference, however to the directions given by the Court of Appeal I have to make certain further observations as follows. In my judgment dated 9th April 1943, I referred to the argument of the plaintiff's counsel to the effect that Shri Rukshmani Vahuji holding the property as a Hindu widow could not, by the very nature and character in which she held the same, hold such other property acquired by her

at any time at all against the reversionary heirs. In that connection I observed :

"It has been held repeatedly that there can be adverse possession by a widow of the property belonging to the joint family property, although that must necessarily depend upon the facts and circumstances of each case to show whether there was or was not adverse possession."

In that connection the defendants' counsel had cited the case of *Lajwanti v. Safa Chand*, (51 I. A. 171 : A. I. R. (11) 1924 P. C. 121), and I had based my observations thereon.

[10] On a reconsideration of that case of *Lajwanti* : (51 I. A. 171 : A. I. R. (11) 1924 P. C. 121) it appears that in that case it was contended by the appellant's counsel that the widows being in adverse possession for the statutory period, the title of Hira Mal, under whom the opposing parties claimed, was barred under S. 28, Limitation Act. Their Lordships of the Privy Council have made certain observations at p. 176 of that case which are very important and they are as follows :

"It was then argued that the widows could only possess for themselves; that the last widow Devi would then acquire a personal title; and that the respondents and not the plaintiffs were the heirs of Devi. This is quite to misunderstand the nature of the widow's possession. The Hindu widow, as often pointed out, is not a life renter, but has a widow's estate — that is to say, a widow's estate in her deceased husband's estate. If possessing as widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as stridhan, but she makes them good to her husband's estate."

To my mind these observations clearly indicate that any adverse possession by a widow holding as a widow as against third parties acquires a title which enures for the benefit of the estate and consequently for the benefit of the reversioner. In other words such holding amounts to an accretion to the estate in her hands. In this connection I may refer to the remarks made by the late Sir Dinshah Mulla in his *Principles of Hindu Law*, 10th Edn., at p. 231 :

"But if the property acquired by adverse possession was claimed and held by her not in her own right, but as a widow representing her husband's estate, it is not her stridhan, but an accretion to her husband's estate, and in it she takes no more than a widow's estate, and it descends on her death to her husband's heirs ... Thus, where a Hindu widow in the enjoyment of her husband's estate as heir remarried and had thereby forfeited her title to the estate, but continued in possession without asserting any change in the character of her possession, she acquires title by prescription only to a widow's estate and not to an absolute estate."

In support of this proposition that a Hindu widow can acquire title against third parties by adverse possession Sir Dinshah Mulla cites the above-said case of *Lajwanti v. Safa Chand* (51 I. A. 171 : A. I. R. (11) 1924 P. C. 121). This view is adopted by a certain judgment of the High Court of Allahabad in *Chandrabali Pa-*

thak v. Bhagwan Prasad Pande, I. L. R. (1944) ALL. 533. The Court observed at p. 537 as follows :

"It is true that possession, unless it is based upon title, must be deemed to be adverse but the possession of a Hindu widow must be treated on a different basis. The true test has always been furnished by the character in which she steps into possession. If she has entered possession, not as a widow of the last male owner or as a widow of the family the possession will be deemed to be adverse, but if she has entered in possession as a widow of the last male owner or as the widow of the family, her possession has never been treated as adverse."

[11] In support of this the Allahabad High Court cited the case of *Gaya Din v. Badri Singh*, (I. L. R. (1943) ALL. 230), and quoted the observations of Hamilton J. to the effect that :

"It seems to follow, if there are no indications to the contrary, that a woman claiming an estate expressly by inheritance must be deemed to be claiming a limited estate."

[12] I am in entire agreement with the view expressed in the above said case, *Chandrabali Pathak v. Bhagwan Prasad Pande*, (I. L. R. (1944) ALL. 533), because it is clear to my mind that a Hindu widow takes a widow's estate or limited estate. Having entered into possession of that estate in that capacity as limited heir, she can certainly hold any part of it adversely to third parties and therefore in the interests of the real reversioner or reversioners. Entering upon the estate in that limited capacity and holding, as described above, a limited estate, she cannot, in my opinion, enlarge it against the reversioner and hold those parcels so as to make them part of her stridhan.

[13] It follows, therefore, that my observation in my judgment dated 9th April 1943, to the effect that "It has been held repeatedly that there can be adverse possession by a widow of the property belonging to the joint family property" was too broadly stated.

[14] I am, therefore, for reasons set out above of the view (a) that Shri Rukshmani Vahuji having acquired those shares of the Tapti Valley Railway Co. as heir of Shri Narsinglalji Maharaj on her own statement, which is supported by the documents in the case, cannot, in any event, claim to hold the same in her own right on the ground of adverse possession and make it her stridhan; (b) that a Hindu widow who has held property in a limited capacity, namely, in her capacity as a Hindu widow in the family, cannot, by its very nature, hold it adversely to the estate and against the reversionary heir or heirs so as to make such property part of her stridhan.

[15] I have nothing further to add.

[16] As regards costs I have reaffirmed in my judgment on the finding of facts as regards the wrongful holding by Shri Rukshmani Vahuji

and there being no question of adverse possession on that and as regards the question of law I have come to the conclusion expressed by me above which is in favour of the plaintiff. On reading the directions of their Lordships of the Privy Council the question of costs is left to the High Court and therefore these costs of remand will be dealt with by the Court of Appeal which will finally be disposing of the question of costs after hearing the appeal on facts and according to law.

R.G.D.

*Order accordingly.***A. I. R. (36) 1949 Bombay 82 [C. N. 26.]**

BHAGWATI J.

Anwari Begum w/o Gulzarkhan—Petitioner v. Commr. of Police, Bombay—Respondent.

Crown Side Petition No. 62 of 1948, Decided on 7th April 1948.

(a) Bombay Public Security Measures Act (VI [6] of 1947), S. 3—Grounds held neither vague nor bad in law.

The notice under S. 3 gave five grounds for detention, viz., (1) that the detenu was a known mawali of Falkland Road locality, (2) that he was a trafficker in opium, (3) that there were a number of mawalis under him, (4) that he extorted money from prostitutes and (5) that he was also responsible for stabbing cases on Falkland Road :

Held, that mawali connotes a person who is a bully and also a person who is a menace to the peace and tranquillity of the part of the city where he may happen to be the person in power. There was nothing vague about it. [Para 3]

Held also, that grounds 2 and 4 read in connection with grounds 1 and 3, did not leave any doubt that the activities of the detenu in that matter would certainly lead to a position which will be prejudicial to the public safety or the tranquillity or the peace of the part of the city wherein the detenu carried on his activities. [Para 3]

Held further, that the only reasonable interpretation of ground 5 was that the detenu was acting in that particular manner and was concerned with and was responsible for stabbing cases on Falkland Road. That had connection not with any remote past but had connection with what happened in the immediate past or recently before the order of detention was made against the detenu. [Para 3]

The grounds of detention were therefore not vague or bad in law. [Para 3]

(b) Bombay Public Security Measures Act (VI [6] of 1947), S. 2 (1) — Order of detention may be oral—Written order coming after actual detention—Onus is on authority to show that it was 'satisfied' before actual arrest and that detention was in consequence of such 'satisfaction.'

There is nothing in the terms of S. 2 (1) to lay down that the detention order should be an order in writing and that it cannot be an oral order passed by the detaining authority after taking into account all the circumstances of the case which go to satisfy him that the detenu is acting in the manner prescribed by S. 2 (1) of the Act before a valid detention order can be made by him against the detenu. This being the position, wherever it is pointed out by a petitioner in the case of a particular detenu that the arrest of the detenu was

made at a particular point of time which is anterior to the order of detention being in fact served upon him, the onus lies on the detaining authority to satisfy the Court by proper materials put before the Court that in fact the 'satisfaction' came before the actual arrest of the detenu was effected under his order and that the detention of the detenu was in pursuance of and in consequence of such satisfaction on his part within the meaning of S. 2 (1) of the Act. Unless and until the detaining authority satisfies the Court in this behalf, the detention order which on *prima facie* appearance is signed and served after the actual arrest, is liable to be set aside. [Para 4]

Murzban J. Mistree — for Petitioner.

C. K. Daphtary, Advocate-General —

for Respondent 1.

Order. — This is a petition filed by the wife of the detenu asking that the detenu should be released. The detenu was arrested at 7 P. M. on 9th March 1948, and the detention order was served on 10 A. M. on 11th March 1948, together with a notice under S. 3, Bombay Public Security Measures Act, 1947, specifying the grounds and particulars of his detention.

[2] It has been contended by counsel for the petitioner that the grounds are vague and outside the ambit of the Act, with the result that the detention order is bad in law. He has analysed the grounds into five specific grounds, viz., (1) that the detenu is a known mawali of Falkland Road locality, (2) that he is a trafficker in opium, (3) that there are a number of mawalis under him, (4) that he extorts money from prostitutes and (5) that he is also responsible for stabbing cases on Falkland Road. He has contended that grounds 1 and 3 that he is a known mawali and that there are a number of mawalis under him are vague inasmuch as the word "mawali" has no definite or certain connotation. He has also contended that being a trafficker in opium and extorting money from prostitutes, howsoever reprehensible these acts may be, are certainly not acts within the ambit of the Act which is intended only to detain persons who are acting in a manner prejudicial to the public safety, the maintenance of public order or tranquillity of the province or any part thereof. As regards the last ground, he has contended that there is nothing in the notice under S. 3 of the Act to show that he was acting in that manner at or about the time when the order for detention was made against the detenu. These are the grounds on which the detention order has been challenged.

[3] As regards grounds 1 and 3, I may say that the word "mawali" has a well known connotation and is not vague. It connotes a person who is a bully and also a person who is a menace to the peace and tranquillity of the part of the city where he may happen to be the person in power. There is nothing vague about it and a person who fairly answers the description per-

fectly well knows what that term means. As regards grounds 2 and 4, if they stood by themselves, they may or may not necessarily lead to the conclusion that the activities of the detenu in that manner may be prejudicial to the public safety or the tranquillity of the city. When, however, they are taken in conjunction with the other grounds that have been mentioned, viz., grounds 1 and 3, they do not leave any doubt that the activities of the detenu in that behalf would certainly lead to a position which will be prejudicial to the public safety or the tranquillity or the peace of the part of the city wherein the detenu carries on his activities. As regards ground 5, there is nothing in the notice which would by any stretch of imagination be taken as referring to some acts of the detenu in the past. The only reasonable interpretation of this ground in the notice is that he is acting in that particular manner and is concerned with and is responsible for stabbing cases on Falkland Road. That has connexion not with any remote past but has connexion with what happened in the immediate past or recently before the order of detention was made against the detenu. Under all these circumstances, I have come to the conclusion that the grounds of the detention order are not vague or bad in law and that they sufficiently comply with the requirements of the Act.

[4] The next ground which has been urged by counsel for the petitioner against this order is that the detenu was arrested at 7 P. M. on 9th March 1948, that the detention order was in fact signed by the Deputy Commissioner of Police on 10th March 1948, and that it was served on the detenu at 10 A. M. on 11th March 1948. He has contended that having regard to these facts it is abundantly clear that the detention came first and the satisfaction which is the essential pre-requisite of a valid order under S. 2 (1) of the Act being made against the detenu came later. He has, therefore, contended that the facts of this case bring it within the observations of the appeal Court, in the appeal decided by the learned Chief Justice and myself, in the case of *Balasaheb Shankerrao Fansalkar* (Crown Side Appeal No. 1 of 1948, decided on 2nd March 1948). The learned Chief Justice in that appeal observed that the satisfaction of the detaining authority was a pre-requisite of the detention of the detenu and that satisfaction must come first and detention must come subsequently. These observations of the learned Chief Justice really point out the sequence of events which has got to be followed in order that the detention of a detenu may be considered legal and valid. One has, however, got to bear in mind that there is nothing in the terms of S. 2 (1) of the Act which prescribes that the order for detention should be an order in writing. The only thing which is en-

acted there is that the detaining authority should be satisfied that the detenu is acting in a manner prejudicial to the public safety, the maintenance of public order, or the tranquillity of the Province or any part thereof, and if he is so satisfied, he may make an order directing that the detenu be detained. There is nothing in the terms of this section to lay down that the detention order should be an order in writing and that it cannot be an oral order passed by the detaining authority after taking into account all the circumstances of the case which go to satisfy him that the detenu is acting in the manner prescribed by S. 2 (1) of the Act before a valid detention order can be made by him against the detenu. This being the position, wherever it is pointed out by a petitioner in the case of a particular detenu that the arrest of the detenu was made at a particular point of time which is anterior to the order of detention being in fact served upon him, the onus lies on the detaining authority to satisfy the Court by proper materials put before the Court that in fact the satisfaction came before the actual arrest of the detenu was effected under his order and that the detention of the detenu was in pursuance of and in consequence of such satisfaction on his part within the meaning of S. 2 (1) of the Act. Unless and until the detaining authority satisfies the Court in this behalf, the detention order which on *prima facie* appearances is signed and served after the actual arrest is liable to be set aside.

[5] In the case before me, I have got the affidavit of Vishnu Gopal Kanetkar made by him on 7th April 1948, wherein he says in para. 2 thereof:

"On 9th March 1948 the detenu was directed to be arrested in view of the information and matters relating to the detenu which had been placed before me on full consideration of which I was satisfied that he was acting in a manner prejudicial to the public safety and tranquillity of Greater Bombay. Accordingly the detenu was apprehended and detained."

These facts are not challenged by counsel for the petitioner. As a matter of fact even though I hinted to him that it was open to him to require the deponent of this affidavit Vishnu Gopal Kanetkar to be present in Court in order that he may cross-examine him as to the correctness of the statements which he had made in this para. 2 of his affidavit, no such application was made to me by counsel for the petitioner, with the result that I am entitled to take the statements made by Vishnu Gopal Kanetkar in para. 2 of his affidavit as correct. Taking them as correct, I am also bound to come to the conclusion that as a matter of fact before the order for arrest and detention of the detenu was made by him on 9th March 1948, he had materials before him on which he was satisfied that the detenu was acting in a manner prejudicial to the public safety and tranquillity of Greater Bombay and that the detenu was

arrested in accordance with the order which he passed on 9th March 1948. What followed was merely putting on record the order which he had orally made on 9th March 1948. What is stated in the stereotyped terms of the order dated 10th March 1948, that he, the Deputy Commissioner of Police, "hereby directs" does not go counter to the statements which he has made in his affidavit and does not detract from the position which has been taken up on behalf of respondent 1 in the arguments of this petition before me.

[6] I have, therefore, come to the conclusion that the order for detention which was made against the detenu was not invalid or bad in law, but that the detenu was rightly detained under a proper and valid order made by the authority invested with power in that behalf. The petition made for the release of the detenu, therefore, fails and must be dismissed. Each party will bear and pay his own costs of this petition.

R.G.D.

Petition dismissed.

A. I. R. (36) 1949 Bombay 84 [C. N. 27.]

SEN AND JAHAGIRDAR JJ.

In re Pandurang Govind Phatak — Petitioner.

Criminal Appln. No. 172 of 1948, Decided on 11th March 1948.

Bombay Public Security Measures Act (VI [6] of 1947), Ss. 2 and 3 — Satisfaction of Magistrate — Grounds for — Court cannot enter into — But Court is entitled to see whether authority has applied its mind — Place of detenu's activity not mentioned either in order of detention or in grounds therefor or in affidavit — Authority held did not apply its mind — Detention held bad.

Satisfaction contemplated by S. 2 is of the authority making the order, and the Court is not entitled to consider whether the grounds of the order (so far as they can be ascertained) are such as would satisfy itself. But the Court when the order is challenged, is entitled to enquire, whether the alleged satisfaction is real satisfaction or something else indicating an omission on the part of such authority to apply its mind to the facts of the case and to draw legitimate conclusions therefrom. If the authority has not applied an unbiased mind to the facts, it must be held that it is not a case of real satisfaction. [Para 1]

If the District Magistrate has from the beginning applied an unbiased mind to the facts, he would want to be as fair as possible to the detenu, and this would ordinarily be shown, when he furnishes the grounds of detention under S. 3, by his giving him (subject to the reservations indicated in the said section) as clear and precise grounds as reasonably possible. It is, however, important to bear in mind that as regards the "other particulars," he has the discretion to withhold such of them as are not, in his opinion, necessary for the purpose of enabling the detenu to make the representation. [Para 1]

One thing which the authority has to apply its mind to is the question of its jurisdiction. From this point of view, the place where the detenu is regarded as having been acting in any of the manners mentioned in S. 2 assumes importance; this is one of the particulars which

would be required to be stated in the detention order or the statement of grounds. The application of the detaining authority's mind to the relevant facts and considerations being the necessary prerequisite to its satisfaction, it is open to the detenu to contend and to show that the application of its mind was non-existent or so faulty as to render the alleged fact of its satisfaction questionable and uncertain. *Prima facie*, the fact that the place of the detenu's activities is mentioned neither in the order nor in the grounds of detention nor in the affidavit is an indication that the question was not present in the District Magistrate's mind when he made the detention order. In the circumstances it could not be said that the District Magistrate was satisfied that the detenu was acting in a manner prejudicial to the maintenance of public order at any place within the area with reference to his acts or activities in which a valid order of detention could be made against him. In such a case the order of detention is bad. When under a statute enacted in peaceful and normal times an executive officer of the status of a District Magistrate has been given the authority to interfere with the liberty of a subject, and he has been often proved to be careless, arbitrary and mechanical, and even to act mala fide or with an ulterior object, in making use of the power of detention conferred on him, the Court would not be justified in relying on the principle *omnia esse rite acta*. In such circumstances it becomes the plain duty of the Court to scrutinise the order made and the grounds given therefor with utmost care and anxiety and to make every legitimate inference in favour of the subject: A. I. R. (35) 1948 Bom 360 and (1942) A. C. 206, *Rel. on*. [Paras 2, 3, 4 & 5]

Purshottam Tricumdas and S. A. Kher —

for Petitioner.

S. G. Patwardhan, Government Pleader —

for the Crown.

Sen J.—This is an application by one Pandurang Govind Phatak who was ordered to be detained by the District Magistrate at Thana on 6th February 1948, under S. 2 (1) (a) of the Bombay Public Security Measures Act, 1947. That order stated that, whereas the District Magistrate was satisfied that the said person was acting in a manner prejudicial to the maintenance of public order, the District Magistrate directed that he be detained. In the statement of grounds furnished to the detenu under S. 3 of the Act it was stated:

"You engage in objectionable and harmful activities and incite people to violence."

Under S. 2, the detaining authority has to be satisfied that any person is acting in a manner prejudicial to the public safety, the maintenance of public order, or the tranquillity of the Province or any part thereof, before it can make an order directing that he be detained. The satisfaction, therefore, is of the authority making the order, and the Court is not entitled to consider whether the grounds of the order (so far as they can be ascertained) are such as would satisfy itself. But the Court when the order is challenged, is entitled to enquire, whether the alleged satisfaction is real satisfaction or something else indicating an omission on the part of such authority to apply its mind to the facts of the case and to draw legitimate conclusions there-

from. If the authority has not applied an unbiased mind to the facts, it must be held that it is not a case of real satisfaction. In nearly every case in which the District Magistrate makes an order under S. 2 of the Act he does so on a report made by the police without hearing the possible defence of the detenu. For this reason, it has been enacted in S. 3 that the detaining authority shall, as soon as possible after the order has been made, communicate to the person affected by the order the grounds on which the order has been made, without disclosing facts which it considers against the public interest to disclose, and such other particulars as are in its opinion sufficient to enable him to make a representation against the order and inform him of his right to make such representation and afford him the earliest opportunity of doing so. It is next provided in S. 4 that on receipt of a representation under S. 3, the said authority may either annul or confirm the order or modify it or make any other order which it could have made under sub-s. (1) of S. 2. Accordingly, it was remarked in *In re Krishnaji Gopal Brahme*, 50 Bom. L. R. 175 : (A. I. R. (35) 1948 Bom. 360 : 49 Cr. L. J. 524), that the order made under S. 2 is in the nature of a preliminary order against which the detenu can make a representation on being furnished with the grounds supplied to him under S. 3, and that, on such representation having been considered by the authority in question, a final order is to be passed under S. 4. If, therefore, the District Magistrate has from the beginning applied an unbiased mind to the facts, he would want to be as fair as possible to the detenu, and this would ordinarily be shown, when he furnishes the grounds of detention under S. 3, by his giving him (subject to the reservations indicated in the said section) as clear and precise grounds as reasonably possible. It is, however, important to bear in mind that as regards the "other particulars," he has the discretion to withhold such of them as are not, in his opinion, necessary for the purpose of enabling the detenu to make the representation.

[2] One thing which the authority has to apply its mind to is the question of its jurisdiction. From this point of view, the place where the detenu is regarded as having been acting in any of the manners mentioned in S. 2 assumes importance; this is one of the particulars which would be required to be stated in the detention order or the statement of grounds. In *In re Krishnaji Gopal Brahme*, 50 Bom. L. R. 175 : (A. I. R. (35) 1948 Bom. 360 : 49 Cr. L. J. 524), it was remarked (p. 178) :

"Obviously, if the activities of the petitioner were prejudicial to the tranquillity of say, the Province of Madras or of the territories of the Indian States, the

District Magistrate would have no jurisdiction to pass any order under the Act. When he, therefore, says that he was satisfied that the petitioner Mr. Brahme 'was acting in a manner prejudicial to the public safety and the maintenance of public order and tranquillity and was carrying on subversive propaganda,' he must say that the activities of the petitioner affected the peace and tranquillity of this Province. It is only 'satisfaction' in this sense that it would give to the District Magistrate the jurisdiction to make an order."

In that case, though the place of the detenu's activities was not mentioned in the order under S. 2, the defect was not considered fatal and was regarded as cured because the place was mentioned in the statement of grounds furnished under S. 3. The view taken, therefore, was that it was not altogether essential to mention the place of the detenu's objectionable activities in the order itself, the Court being satisfied from the evidence of the statement of grounds that the District Magistrate had actually considered the activities of the detenu with reference to a specific place or area. In this case, however, the place of the detenu's activities is not mentioned either in the order passed under S. 2 or in the grounds of detention furnished under S. 3, or even in the affidavit of the District Magistrate which has now been filed.

[3] It may be said that normally a District Magistrate would not take into account the detenu's activities outside his jurisdiction, and that in any case in this case it is not alleged by him that he went out of the district in recent months. But the District Magistrate has to be alive to the fact that his order is liable to be challenged, and that when the order comes to this Court it would want to be satisfied that the important question of jurisdiction was present in his mind, particularly if the point is taken in arguments before it. *Prima facie*, the fact that the place of the detenu's activities is mentioned neither in the order nor in the grounds of detention nor in the affidavit is an indication that the question was not present in the District Magistrate's mind when he made the detention order. At least at the stage when he made the affidavit his legal advisers would be expected to inform him of the importance of the question which is being discussed, particularly after the decision in *Brahme's case* : (50 Bom. L. R. 175 : A. I. R. (35) 1948 Bom. 360 : 49 Cr. L. J. 524), on 8th October 1947. The power that the Legislature has placed in the hands of Government, and in case of delegation of their authority, of a District Magistrate or other officer, to interfere with the liberty of the subject is so great that such authority must be capable of justifying the exercise of such power when it is challenged by showing that it applied its mind to the material facts and to the appropriate considerations, and the Court must scrutinize the justification thus offered with the

greatest care and anxiety. The application of the detaining authority's mind to the relevant facts and considerations being the necessary pre-requisite to its satisfaction, it is open to the detenu to contend and to show that the application of its mind was non-existent or so faulty as to render the alleged fact of its satisfaction questionable and uncertain.

[4] In a proper case, e. g., *Liversidge v. Sir John Anderson* (1942) A. C. 206 : (110 L. J. K. B. 724), where the power of detention was exercised by a high official of the State like the Secretary of State, who was answerable to the British Parliament in carrying out his duties, and where the Court was concerned with an emergency war measure, in enacting which the legislative Act had recognised the temporary need for subordinating the liberty of the individual to the safety of the realm, the well-known presumption *omnia esse rite acta* would apply, and the order would be taken *prima facie* to have been properly made, the requisite conditions having been complied with. But when under a statute enacted in more peaceful and normal times an executive officer of the status of a District Magistrate has been given the authority to interfere with the liberty of a subject, and it has become manifest to this Court in numerous instances that such an officer is often prone to be careless, arbitrary and mechanical, and even to act *mala fide* or with an ulterior object, in making use of the power of detention conferred on him, we should not, we think, be justified in relying on the said principle. In such circumstances it becomes our plain duty to scrutinise the order made and the grounds given therefor with the utmost care and anxiety and to make every legitimate inference in favour of the subject.

[5] In view of the facts of this case we are unable to hold that the District Magistrate was satisfied that the detenu was acting in a manner prejudicial to the maintenance of public order at any place within the area with reference to his acts or activities in which a valid order of detention could be made against him. In that view, we need not go into the merits of the other points urged before us on behalf of the detenu. The petition succeeds on the one ground which we have considered and must be allowed.

[6] We direct the detenu to be set at liberty forthwith. He will get his costs of this application from Government.

R.G.D.

Order set aside.

A. I. R. (36) 1949 Bombay 86 [C. N. 28.]

SEN AND JAHAGIRDAR JJ.

In re Moinuddin Abdullamia Koreishi — Petitioner.

Criminal Appln. No. 242 of 1948. Decided on 14th April 1948, from order of Dist. Magistrate, Ahmedabad, D/-19th February 1948.

(a) Bombay Public Security Measures Act (VI [6] of 1947), S. 2 (1) (a)—Order under, *ex facie* good and valid — Detenu might successfully controvert it — Court satisfied that detaining authority had applied its mind — Detenu can show that facts relied upon by authority were false — Detenu can rely for this purpose, on statement of grounds and particulars furnished to him — For showing falsity of facts relied on he can file affidavit— Authority also can file affidavit.

It is open to the detenu to prove facts which might successfully controvert the order of detention although it might be *ex facie* a good and a valid order. He can be allowed to show that the order was not made *bona fide* but for ulterior purposes, or that it was made without sufficient application of the mind of the detaining authority to the facts or requirements of law, or that it was passed on a ground outside the scope of the Act, or that it was passed, at least partially, on a proposition of fact which is shown to be false: A. I. R. (32) 1945 P. C. 156, *Rel. on* ; (1942) A. C. 206 and (1942) A. C. 284, *Considered* ; (1839) 2 Ad. & El. 731 and (1917) A. C. 260, *Ref.* [Paras 2 and 6]

In such a case the presumption *omnia esse rite acta* cannot be applied. When under a statute enacted in more peaceful and normal times an executive officer of the status of a District Magistrate has been given an authority to interfere with the liberty of a subject, and it has become manifest in numerous instances that such an officer is often prone to be careless, arbitrary and mechanical, and even to act *mala fide* or with an ulterior object, in making use of the power of detention conferred on him, the Court would not be justified in relying on the said principle. In such circumstances it becomes its plain duty to scrutinize the order made and the grounds given therefor with the utmost care and anxiety and to make every legitimate inference in favour of the subject: A. I. R. (36) 1949 Bom. 84, *Rel. on.* [Para 5]

Ordinarily, where the Court is satisfied that the facts and materials before the District Magistrate were considered by him, and that they were such as could lead to his satisfaction in the sense required by S. 2 of the Act, the Court would not go behind the order; but the Court would in such cases assume that the authority had made every reasonable endeavour, consistently with his responsibilities, to ascertain the facts correctly. Where, however, a fact relied on is found to be false, and the said authority, by applying his mind to materials before him, could have found out the falsity of the said fact, such falsity would vitiate the order as showing an insufficient application of mind on his part to the facts before him. Where, however, the falsity is such as could not thus ordinarily be found out in the process of applying his mind to the facts, the question is somewhat more difficult.

It is legitimate for the detenu to rely on the statements of grounds and particulars furnished to him in order to show that a fact alleged therein is false. For that purpose he is allowed to rely on his own affidavit and the affidavits of persons acquainted with such facts. Statements are not tested in the manner of regular evidence given at trials. It would ordinarily not be right for the Court in such a case to set down a

question of fact as a question to be decided on any evidence except that furnished by the affidavits. If the Court is satisfied that the order has been made *bona fide*, there would ordinarily be every reason to accept a statement of fact mentioned in the grounds when it is reinforced by the detaining authority's affidavit. But there may be cases in which, though the authority was *bona fide* satisfied in terms of S. 2, an essential or significant fact may be successfully falsified by the petitioner and the Court would be inclined to hold that the satisfaction was based on a proposition of fact not found to be tenable, and the Court would be entitled to interfere: A. I. R. (32) 1945 P. C. 156, *Rel. on.*

[Para 6]

(b) Bombay Public Security Measures Act (VI [6] of 1947), S. 2—"Is acting"—Period of two months prior to date of order cannot be considered as outside its scope.

The expression 'is acting' refers to a reasonable period which could be regarded as present and not past, so that acts done in the approximate and immediate past might legitimately form the basis of an order of detention. An act may take some time for being reported to the police, and thereafter further time would be required for investigation by the police, for their making report to the District Magistrate and for the latter Officer's considering the report before making an order. In view of such requirements, a period, say of two months, prior to the date of the order cannot be considered as outside such period as may reasonably be regarded within the scope of the expression 'is acting.'

[Para 9]

(c) Bombay Public Security Measures Act (VI [6] of 1947), S. 2 (1) (a)—Order based on acts done while person was within jurisdiction—Temporary absence of person from jurisdiction—Order operates when such person returns within jurisdiction.

When an order under the Act is based on acts which, *prima facie*, are alleged to have been done by the detenu while he was at a place within jurisdiction, the order is rightly passed and would operate when the detenu again appears at that place after his temporary absence from the jurisdiction.

[Para 11]

(d) Bombay Public Security Measures Act (VI [6] of 1947), S. 3—Grounds supplied on 25th February, saying detenu was active worker of certain organization—Organization already declared illegal on 8th February—Order held referred to activities prior to 8th February.

Where the District Magistrate in the statement of grounds furnished on 25th February 1948 said that the detenu was "an active worker of the Muslim National Guards" in Ahmedabad, an organization which was declared illegal on 8th February 1948, it could not be said that it was the intention of the District Magistrate to mean that the detenu had been an active worker of the Muslim National Guards after 8th February particularly as that was a date on which the detenu was away from Ahmedabad. The order referred to activities prior to 8th February: A. I. R. (35) 1948 Bom. 334 (F. B.) and A. I. R. (18) 1931 Bom. 129, *Ref.*

[Para 12]

K. A. Somjee and B. G. Thakor—for Petitioner.

C. K. Daphtary, Advocate-General and S. G. Patwardhan, Government Pleader—for the Crown.

Sen J.—This application is made by one Moinuddin Abdullamia Koreishi under S. 491, Criminal P. C., 1898, against the order of detention made against him on 19th February 1948, by the District Magistrate of Ahmedabad. That order was made under S. 2 (1) (a), Bombay

Public Security Measures Act, 1947, and stated that whereas the said District Magistrate was satisfied that the detenu was acting in a manner prejudicial to the public safety, the maintenance of public order and the tranquillity of Ahmedabad City, he directed the said Moinuddin Abdullamia Koreishi to be detained. On 25th February 1948, the District Magistrate specified the grounds of the order and the particulars required to be supplied under S. 3 of the Act to the detenu. The material part of that statement is as follows:

"You being an active member of the Muslim National Guards organization in Ahmedabad City and in furtherance of the objects of this organization have been provoking and propagating communal hatred and violence, that you incite Muslims against Hindus generally, that your activities are aimed at keeping the communal discord and disharmony alive, that you preach doctrines subversive to law and order in Ahmedabad City and that your being at large is detrimental to the public peace, safety and order in Ahmedabad City."

In the present application it is stated that the detenu practised as an advocate in the Ahmedabad Courts for some years, that thereafter he took to journalism and purchased a daily newspaper and a press in 1945, that he is not connected with the Muslim National Guards organization in Ahmedabad City, not being a member thereof and not having ever taken any part in that organization, that ever since 15th August 1947, there has been no communal or Hindu-Muslim trouble in the city of Ahmedabad, and that about 8th January 1948 he went to Karachi for purposes of business and came back to Ahmedabad only to receive the order of detention made against him. He has further stated that he has established business connections at Karachi and intends to wind up his business at Ahmedabad and develop it at Karachi as well as to go to England later on for his business; that all the allegations made in the order and the grounds furnished to him are false, that on learning that his name was included in the names of the persons who were to be detained he wrote to the District Magistrate on 13th February intimating that he would be coming to Ahmedabad, and that on his arrival he was arrested and kept under detention in the Ahmedabad Central Prison at Sabarmati where he was served with the detention order. The District Magistrate has made an affidavit wherein the petitioner's statements that he is not connected with the Muslim National Guards in the Ahmedabad city and has not taken any part in the activities of that organization have been denied as also his statement that he is not indulging in any activities dangerous to the public peace, and further the allegation that the District Magistrate has not applied his mind to the circumstances of the case and has passed only a

mechanical order is also denied. The District Magistrate has further deposed that he :

"Passed the order after carefully considering the District Superintendent of Police's detention proposal and satisfying himself about the grounds for detention mentioned in the proposal."

The detenu has now filed a fresh affidavit repeating that he was never connected with, or a member of, and has never taken part in any activities of, the Muslim National Guards organization.

[2] The order made by the learned District Magistrate under S. 2 of the Act is admittedly *ex facie* a good order. In the course of the hearing of this case the learned Advocate-General, who appears for the Crown, has raised the question whether when an order made under the Act is *ex facie* good and valid the Court can go at all behind it and examine any other circumstance, like the grounds supplied to the detenu under the procedure prescribed for further consideration of the case by the detaining authority or any other fact on which the detention order appears to be based and which is sought to be falsified by the detenu in order to show that the order is bad. It has been contended that as S. 2 empowers the detaining authority to act on his own belief or satisfaction as to the matters mentioned in that section, the Court cannot go behind it and consider either the adequacy of the reasons or the information available to the District Magistrate or even the truth of any of the facts which go to establish the said condition of his mind. If it be the law that the examination of any such circumstances or matters is beyond the Court's jurisdiction, a large number of decisions relating to the Act would inevitably turn out to be wrong; for though it is well-established that the Court cannot consider the adequacy of the reasons or of the information available to the detaining authority which led to his belief or satisfaction, even where the detention order has been *ex facie* good under S. 2 of the Act, this Court has allowed the detenu, in a large number of cases, to show that the order was not made bona fide but for ulterior purposes, or that it was made without sufficient application of the mind of the detaining authority to the facts or requirements of law, or that it was passed on a ground outside the scope of the Act, or that it was passed, at least partially, on a proposition of fact which is shown to be false. In *Emperor v. Sibnath Banerji*, 48 Bom L. R. 1 (A. I. R. (32) 1945 P. C. 156) it was contended on behalf of the Crown that the orders there dealt with being on their face regular and in conformity with the language of the rule, it was not open to the Court to investigate their validity any further. Their Lord-

ships said that this contention of the Crown "went too far" and approved of the following statement by the learned Chief Justice of the Federal Court (p. 8) :

"It is quite a different thing to question the accuracy of a recital contained in a duly authenticated order, particularly where the recital purports to state as a fact the carrying out of what I regard as a condition necessary to the valid making of that order. In the normal case the existence of such a recital in a duly authenticated order will, in the absence of any evidence as to its inaccuracy, be accepted by a Court as establishing that the necessary condition was fulfilled. The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate."

The expressions 'any evidence as to its inaccuracy' and 'will place a difficult burden on the detenu to produce admissible evidence' show that consideration by the Court of evidence in such a case was not ruled out. In two of the cases before them their Lordships held that the *ex facie* presumption was displaced by evidence showing that the authority making the orders had not considered the materials before him so as to satisfy himself, independently of the police recommendation that such orders should be issued. In certain other cases their Lordships held that there was no evidence to rebut the presumption of the regularity of the orders; and with regard to one case they remarked that if the respondents had wished to probe the matter, they should not have let the matter rest where it stood "but proceeded either by counter affidavit or by cross-examination of Mr. Porter on his affidavit. As they did not take such a course the presumption remains undisturbed." In view of this decision, it is really not necessary to go to the English cases, *Liversidge v. Sir John Anderson*, 1942 A. C. 206: (1941-3 ALL E. R. 338) and *Greene v. Secretary of State for Home Affairs*, 1942 A. C. 284: (1941-3 ALL E. R. 388) on which reliance has been placed by the Crown. It would be pertinent, however, to point out that the extreme view to be found, for instance, in certain parts of the speeches of Lord Wright cannot be said to be unqualified. At p. 267 Lord Wright said :

"... they go to show that the regulation is dealing with an executive discretion, in the exercise of which the discretion of the minister is final. They seem to me to be inconsistent with the idea that recourse to a Court of law by way of appeal against or justification of the order was open. Indeed, if that had been contemplated I think that there must have been express words giving it. These provisions seem to me to be a substitute for a trial in Court of the issue, no doubt inadequate in one sense, but as effective as the circumstances admit. I particularly rely in support of my conclusion on the circumstance that the secretary is entitled to decline to follow the recommendation or advice of the committee. The responsibility is his alone."

Again, in *Greene's case*, 1942 A. C. 284: (1941-3 ALL E. R. 388) the same noble Lord said (p. 305):

"In making the order Sir John Anderson exercised that plenary discretion, and the respondent, when he succeeded him as Home Secretary, exercised the same plenary discretion when he adopted the order and continued the detention. The order relied on by the respondent is *ex facie* good and valid. Its authenticity is not disputed. It is not said that the appellant is not the person intended. The order itself justifies the detention."

However, in the same speech further on it was said (p. 306) :

"It is good on its face unless and until it is falsified . . . His statement would have been enough at least in the first instance and until it appeared to the Court that sufficient reason was shown to question it and to exercise its power to enquire into the merits under S. 3 of the Act of 1816."

That Act is the Habeas Corpus Act of 1816, Ss. 3 and 4 of which are confined to cases where persons have been confined or restrained of their liberty otherwise than for some criminal or supposed criminal matter and except persons imprisoned for debt or by process in any civil suit; and, in such cases, the Judge was given power "to examine into the truth of the facts set forth" in the return although the return "be good and sufficient in law." The writ to be issued under that Act required the person to whom it was addressed to have the body of the person named therein who was "taken and detained under your custody, as is said, together with the day and cause of his being taken and detained, to undergo and receive all and singular such matters and things as the Court shall then and there consider of concerning him in his behalf;" and the return was to contain a copy of all the causes of the prisoner's detainer indorsed on the writ or on a separate schedule annexed thereto, and to state facts relied on as constituting a valid and sufficient ground for detention of the person alleged to be illegally detained. "These facts must be set forth clearly and directly and with sufficient particularity." (Halsbury's Laws of England, Vol. IX, p. 733). It was not necessary in the first instance to support the facts set out in the return by affidavit; "for until impeached they are to be regarded as true." (*Leonard Watson's case*, (1839) 9 Ad. & El. 731). In cases except those excepted from the purview of Ss. 3 and 4 of the Act the Judge was by statute empowered to enquire into the truth of the facts set forth in the return, although the return might be good and sufficient in law (Halsbury's Laws of England Vol. IX, p. 735). Thus it is clear that under the ordinary law the Court was entitled to go into the facts in an appropriate case in England. In *Greene's case*, 1942 A. C. 284 : (1941-3 ALL E. R. 388) it was remarked by Lord Wright (p. 307) : "In the present case there are no facts to inquire into;" and in *Liversidge's case*, 1942 A. C. 206 : (1941-3 ALL E. R. 338) the following remarks

made by MacKinnon L. J. of the Court of Appeal were approved (p. 216) :

"Put in another way, if the plaintiff admits, or it is proved, that the plaintiff was detained by an order purporting or expressed to be issued under the regulation, and duly signed as such, the burden is on the plaintiff, if he is to claim damages for false imprisonment, to give evidence showing that the order was invalid. As the case proceeds at the hearing, as often happens, the onus of proof may be shifted. If the plaintiff adduces evidence which goes to show the invalidity of the order, that might happen. If, upon that happening, the defendants produced evidence which was embarrassing to the plaintiff, by way of surprise or novelty, the Judge would no doubt protect him by way of adjournment. Conceivably, in a proper case, the Judge might at that stage make some order by way of particulars of the allegations of the defendants. These, however, are but hypothetical considerations as to possible developments at a later stage of the litigation. At this stage we are quite clear that the plaintiff is wrong in his proposition as to the burden of proof inherently resting upon himself and upon the defendants respectively."

The 'stage' under consideration was that (besides claiming a declaration that his detention was unlawful) the detenu was seeking particulars (a) of the grounds on which the respondent had reasonable cause to believe him to be a person of hostile associations, and (b) of the grounds on which the respondent had reasonable cause to believe that by reason of such hostile associations it was necessary to exercise control over him. Viscount Maugham remarked (p. 224) :

".... assuming the order to be proved or admitted, it must be taken *prima facie*, that is until the contrary is proved, to have been properly made and that the requisite as to the belief of the Secretary of State was complied with :"

and at p. 295 the following observations of Goddard L.J. were approved :

"I am of opinion, that where on the return an order or warrant which is valid on its face is produced it is for the prisoner to prove the facts necessary to controvert it, and in the present case this has not been done." It is thus amply clear that it was open to the detenu to prove facts which might successfully controvert the order of detention although it might be *ex facie* a good and valid order.

[3] There are, besides, certain matters in which Reg. 18B, Defence General Regulations, 1939, differed essentially from the present Act. In the first place, the said regulations were enacted during the last war, and the present Act has been enacted after the completion of that war. With reference to the British Regulations, Lord Macmillan observed at p. 251 in *Liversidge's case*, 1942 A. C. 206 : (1941-3 ALL E. R. 338) :

"...in a time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the Courts would be slow to attribute to a peace time measure."

Again, at p. 257 his Lordship said :

"At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses

for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention."

With reference to the decision in *Rex v. Halliday*, 1917 A. C. 260 : (86 L.J.K.B. 1119), a *habeas corpus* case arising during the first war on a regulation very similar in its general character to Regn. 18B, Lord Wright at p. 263 observed:

"It (the regulation) was directed to taking precautions during the war against the dangers of espionage and sabotage which experience showed to be so serious."

At p. 280 Lord Romer referred with approval to the following passages from the speech of Lord Atkinson in *Rex v. Halliday*, 1917 A. C. 260 : (86 L. J. K. B. 1119) (page 271) :

"However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement."

In Halsbury's Laws of England, Vol. VI, at p. 527, it is stated :

"Presumptions in favour of the liberty or property of the subject, which are usually of great effect in interpreting statutes in time of peace, become relatively weak in time of war when the safety of the realm is in danger."

[4] The next point of difference between the British Regulations and the Act under consideration is that the power of detaining a person was given under the former to the Secretary of State for Home affairs while in the present case it is generally exercised by a District Magistrate. Lord Macmillan in *Liversidge's case* : (1942 A. C. 206 : 1941-3 ALL E. R. 338) pointed out (p. 252) :

"In the next place, it is relevant to consider to whom the emergency power of detention is confided. The statute has authorized it to be conferred on a Secretary of State, one of the high officers of State who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office and who has access to exclusive sources of information."

His Lordship further pointed out that elaborate provision had been made for the safeguarding of the detained person's interest, namely, the constitution of the advisory committees to which any person aggrieved by the detention order might make representations and the duty imposed on the chairman of such a committee to inform the objector of the grounds on which the detention order had been made and to furnish him with such particulars as were in the chairman's opinion sufficient to enable him to state his case. There was a further safeguard in the requirement that the Secretary of State must at least every month report to the Parliament the action taken by him under the regulation (including the number of persons detained under orders made thereunder) and the number of cases in which he had declined to follow the advice of the advisory committee. It will be observed

that though under the British enactment the detenué was to be informed of the grounds of his detention and such particulars as were in the chairman's opinion sufficient to enable him to state his case, such grounds and particulars were to be furnished, not by the Secretary of State, the detaining authority, but by the chairman of the advisory committee dealing with his case. At p. 240 Lord Atkinson no doubt observed that these grounds and particulars must be furnished to the chairman by the Secretary of State, for otherwise the chairman had no means of knowledge. It is, however, pertinent to observe that though in *Greene's case* : (1942 A. C. 284 : (1941-3 ALL E. R. 388) wrong grounds and particulars had been furnished by the advisory committee, the Secretary of State was not held accountable for the said mistake, and the principal claim in *Liversidge's case* : (1942 A. C. 206 : 1941-3 ALL E. R. 338) was that the detenué should be furnished with the grounds on which the Secretary of State had reasonable cause to believe him to be a person of hostile associations and of the grounds on which the Secretary of State thought that it was necessary to exercise control over him. Their Lordships, therefore, obviously did not regard the furnishing of grounds and particulars by the advisory committee as equivalent to their being furnished by the Secretary of State.

[5] It has next to be observed that neither in *Liversidge's case* : (1942 A. C. 206 : (1941-3 ALL E. R. 338) nor in *Greene's case* : (1942 A. C. 284 : (1941-3 ALL E. R. 388) was the good faith of the detaining authority challenged. It has, however, been challenged in the present case as well as in most of the other cases under the Bombay Act with which we have had to deal. Lastly, at p. 224 Viscount Maugham relied on the well-known presumption *omnia esse rite acta*. In a case recently decided by us, *In re, Pandurang Govind Pathak*, 50 Bom. L. R. 446 : (A. I. R. (36) 1949 Bom. 84) I said (p. 448) :

"In a proper case, e.g. *Liversidge v. Sir John Anderson*, (1942 A. C. 206 : 1941-3 All. E.R. 338), where the power of detention was exercised by a high official of the State like the Secretary of State, who was answerable to the British Parliament in carrying out his duties, and where the Court was concerned with an emergency war measure, in enacting which the legislative Act had recognised the temporary need for subordinating the liberty of the individual to the safety of the realm, the well-known presumption *omnia esse rite acta* would apply, and the order would be taken *prima facie* to have been properly made, the requisite conditions having been complied with. But when under a statute enacted in more peaceful and normal times an executive officer of the status of a District Magistrate has been given the authority to interfere with the liberty of a subject, and it has become manifest to this Court in numerous instances that such an officer is often prone to be careless, arbitrary and mechanical and even to act *mala fide* or with an ulterior object, in making use of the power of

detention conferred on him, we should not, we think, be justified in relying on the said principle. In such circumstances it becomes our plain duty to scrutinize the order made and the grounds given therefor with the utmost care and anxiety and to make every legitimate inference in favour of the subject."

Those remarks would apply to the present case also.

[6] We have no doubt that in suitable cases the Court would be competent to go behind the order of detention even if it was *ex facie* good and enquire into the truth of the information on which the detaining authority has acted. For instance, in a recent case the grounds of detention given to the detenu were in effect that the Rashtriya Swayamsevak Sangh, as a body, was inspired by a cult of violence and that the detenu, as an office-bearer or active worker of the said Sangh, had furthered the objects of the said body. It was found, by reference to a communique issued by the Government of India, that the said body was not regarded as an organization which, as a whole was inspired by a cult of violence and that the source of the District Magistrate's information that the said Sangh was a body so inspired was the said communique. It was, therefore, further held that the grounds of detention, which were mainly based on a misreading of the Government of India's communique, were falsified, and accordingly the detenus concerned were directed to be released. To take another example, if the ground of detention is that the detenu made a speech at a certain place on a certain date which was objectionable and it was proved that on that date he was actually in jail and thus incapable of making the said speech, the Court would undoubtedly interfere with the detention. Ordinarily, where the Court is satisfied that the facts and materials before the District Magistrate were considered by him, and that they were such as could lead to his satisfaction in the sense required by S. 2 of the Act the Court would not go behind the order; but the Court would in such cases assume that the authority had made every reasonable endeavour, consistently with his responsibilities, to ascertain the facts correctly. Where a fact relied on is found to be false, and the said authority, by applying his mind to materials before him, could have found out the falsity of the said fact, such falsity would vitiate the order as showing an insufficient application of mind on his part to the facts before him. Where, however, the falsity is such as could not thus ordinarily be found out in the process of applying his mind to the facts, the question is somewhat more difficult. Detenues or petitioners who make applications on their behalf often challenge the truth of one or more of the facts stated in the detention order or in the statement of the grounds of detention by means of affidavits, either of themselves or of

others. The statement of grounds is no doubt furnished with the primary object of enabling the detenu to make a representation to the authority which made the detention order, which may thus be regarded as a preliminary order which could, after consideration of such representation as the detenu may make, in a final order be confirmed, modified or annulled. But the statement of grounds undoubtedly furnishes materials which the detenu can use for the purposes of his petition to Court. In furnishing them the authority often lays bare the process of his thought which led to his satisfaction, though S. 3 allows him to withhold such facts as he considers it against public interest to disclose. Except for such facts he is bound to disclose "the grounds on which the order has been made" as well as "such other particulars as are in his opinion sufficient to enable him (the detenu) to make a representation" against the order. The use of the words "other particulars" suggests that no sharp distinction is intended between grounds and particulars, though grounds would no doubt be more general in character than particulars. We are unable to agree with the learned Advocate-General that the grounds can be only those that are to be found in S. 2, and that every other reason for detention furnished to the detenu should be included in the expression "other particulars." But such grounds and particulars (subject to the reservation mentioned above) are, it will be seen, the detaining authority's grounds and particulars and not such grounds and particulars as were furnished by an advisory committee under the British Regulation, 18B. It is, therefore, legitimate for the detenu to rely on the statements of grounds and particulars furnished to him in order to show that a fact alleged therein is false. For that purpose he is allowed to rely on his own affidavit and the affidavits of persons acquainted with such facts. In this connection the following observation of the Privy Council in *Emperor v. Sibnath Banerji*, 48 Bom. L. R. 1 : (A. I. R. (32) 1945 P. C. 156) appears to be relevant :

"The presence of the recital in the order will place a difficult burden on the detenu to produce admissible evidence sufficient to establish even a *prima facie* case that the recital is not accurate."

This is so because the Court will not ordinarily look behind the order, when it is *ex facie* a good order, in order to see whether the authority was satisfied in the terms of S. 2 of the Act, and it is doubly so where any statement of fact in the grounds is supported by the District Magistrate's affidavit. Affidavits furnished in such cases are often by the detenu himself or by persons interested in him, and in any case such statements are not tested in the manner of regular evidence given at trials. It would, in my opinion, ordinarily not be right for the Court in such a case

to set down a question of fact as a question to be decided on any evidence except that furnished by the affidavits. If the Court is satisfied that the order has been made bona fide, there would ordinarily be every reason to accept a statement of fact mentioned in the grounds when it is reinforced by the detaining authority's affidavit. But there may be cases in which though the authority was bona fide satisfied in terms of S. 2, an essential or significant fact may be successfully falsified by the petitioner, for instance, if it is stated that the detenu, being a member of a society which indulged in violent activities as a policy, was carrying out such policy of the society and if it is found (e. g., on the basis of the detenu's affidavit, there being no denial) that the detenu was not at all a member of the said society, we would be inclined to hold that the satisfaction was based on a proposition of fact not found to be tenable, and we would be entitled to interfere.

[7] It may be objected that such a view would result in bringing in interference of this Court through the back door, so to speak, although it is recognized that the order of detention is an executive order made by an authority responsible for the public safety and public order and that such order is justified by the authority's satisfaction in terms of S. 2. The answer to such criticism is that where the basis of the order is as a matter of fact found to be erroneous, at least in some essential particulars, it is not possible to hold that the deprivation of the subject's liberty is justified. I have already said that the Court would not lightly come to such a decision where the order is *ex facie* good and where the person detained has not shown mala fides in the detaining authority. In such a case, if the statement of grounds under S. 3 (reinforced, if necessary, by the said authority's affidavit) shows that the authority had before him materials on which an order of detention could be made and if he was not likely to have been influenced by improper or wrong grounds, it would be most difficult for the detenu to obtain any relief in a petition like the present.

[8] I shall now come to the facts of the present case. The first argument relied on by Mr. Somjee is that the statement that the detenu is an active worker of the Muslim National Guards organization in Ahmedabad City to be found in the statement of grounds is falsified by the affidavit of the detenu and that of one Khatib, an Advocate, wherein it is stated that the detenu was neither connected with such an organization, nor a member thereof, nor has he ever taken part in that organization. It is contended that as the basis of the grounds of detention is falsified, the order must be deemed to be bad. It

has, however, to be observed that the District Magistrate in his affidavit dated 18th March 1948, has not denied that the detenu was not a member of the said organization, though he has denied that the petitioner was not connected with that organization or has not taken part in its activities; so that it seems that, according to the District Magistrate, though the detenu may never have been a member of the Muslim National Guards organization, he was "an active worker" of the said body. We are not inclined to hold that the two affidavits relied on sufficiently show that the allegation that the detenu was an active member of the said organization is false. In any case, what is regarded as important in the statement of grounds is the acts attributed to the detenu, namely, the provoking and propagating communal hatred and violence, the exciting of Muslims against Hindus generally, his activities being aimed at keeping the communal discord and disharmony alive and his preaching doctrines subversive to law and order in Ahmedabad City; and it is as a sort of preamble of this statement of acts attributed to the detenu that it is stated that, being an active worker of the Muslim National Guards organization and in furtherance of the objects of that organization, he has been doing the acts mentioned. Those acts are clearly not such as cannot justify an order of detention made under S. 2 of the Act.

[9] It has been next contended that as the detenu was away from 8th January 1948, to 22nd February 1948, that is, a period of about 1½ months, any objectionable activities that he could indulge in would not be activities which would come within the scope of his "acting" under S. 2; they would at best be activities which took place at a time which was outside the scope of the words "is acting." It has been held in several cases on this point that the expression "is acting" refers to a reasonable period which could be regarded as present and not past, so that acts done in the approximate and immediate past might legitimately form the basis of an order of detention. An act may take some time for being reported to the police, and thereafter further time would be required for investigation by the police, for their making report to the District Magistrate and for the latter officer's considering the report before making an order. In view of such requirements, we do not think that a period, say of two months, prior to the date of the order can be considered as outside such period as may reasonably be regarded within the scope of the expression "is acting." There is no reason to think that the District Magistrate has attributed to the detenu acts within the period of his absence from Ahmedabad or that he was unaware of the fact that detenu was away from Ahmedabad from

8th January 1948. This view disposes of the further contention urged by Mr. Somjee that as on 8th February 1948, the Muslim National Guards organization was declared an unlawful body no active work on behalf of, and no connexion with, the said body was possible after that date.

[10] It has been contended that the grounds are vague and not precise. The answer to this contention is to be found in the kind of ground which was found to be valid in *In re Rajdhar Kalu Patil*, 50 Bom. L. R. 183: (A.I.R. (35) 1948 Bom. 334: 49 Cr. L. J. 465 FB). The grounds stated are under several heads and seem to us to be reasonably clear from vagueness and obscurity.

[11] Mr. Somjee has further contended that the order of detention was made at a time when the detenu was out of Ahmedabad, that is, when he was outside the jurisdiction of the District Magistrate of Ahmedabad. This fact alone, according to him, makes the order null and void. We are unable to agree, because the order is based on acts which, *prima facie*, are alleged to have been done by the detenu while he was at Ahmedabad. The order, therefore, was rightly passed and would operate when the detenu again appeared at Ahmedabad after his absence.

[12] It is next contended that it was wrong for the District Magistrate to say on 25th February 1948, in his statement of grounds, that is, on a date subsequent to the declaration made by Government that the Muslim National Guards organization was an illegal body, "You being an active worker of the Muslim National Guards organization in Ahmedabad city and in furtherance of the objects of this organization", etc., because the said organization was declared illegal on 8th February and it was not possible for the detenu to remain an active worker of the said body after that date. In this connexion reliance was placed on *Emperor v. Shripad*, 33 Bom. L. R. 90: (A. I. R. (18) 1931 Bom. 129: 32 Cr. L. J. 472) and *Emperor v. Dharmanand Kosambi*, 33 Bom. L. R. 333: (A. I. R. (18) 1931 Bom. 203: 32 Cr. L. J. 725). We do not think that it was the intention of the learned District Magistrate to mean that the detenu had been an active worker of the Muslim National Guards after 8th February particularly as that is a date on which the detenu was away at Karachi from where he did not return till 22nd February. The facts of the case indicate that his activities prior to 8th February 1948, that is, before he went to Karachi, were being referred to.

[13] We are, therefore, satisfied that no sufficient grounds have been made out suggesting that the order of detention was not properly made or was not justified. The rule will, accordingly, be discharged.

R.G.D.

Rule discharged.

A. I. R. (36) 1949 Bombay 93 [C. N. 29.]

TENDOLKAR J.

Ratanchand Hirachand and others—Petitioners v. D. R. Pradhan—Respondent.

O. C. J. Misc. Nos. 2, 46, 52, 53, 58, 59 and 64 of 1948, Decided on 15th April 1948.

Bombay Land Requisition Ordinance (V [5] of 1947) — Ordinance is *intra vires* the Governor of Bombay — Government of India Act (1935), S. 104, notification under—Government of India, Ministry of Law Notification No. F. 311-47-C. & G., dated 21st October 1947—Notification is valid.

The Bombay Ordinance No. V [5] of 1947 which provides for requisitioning of land in the Province of Bombay is *intra vires* the Governor of Bombay.

The Ordinance is promulgated under the authority validly conferred on the Provincial Legislature to enact laws with respect to requisition of land, by a notification of the Governor-General of India being the Government of India, Ministry of Law Notification No. F. 311-47-C. & G. dated 21st October 1947 under S. 104, Government of India Act.

[Para 5]

V. F. Taraporewalla and M. M. Desai (in Misc. No. 2 of 1948), K. J. Kolah (in Misc. Nos. 46, 52 and 53 of 1948), H. D. Banaji (in Misc. No. 58 of 1948), N. A. Palkhiwalla (in Misc. No. 59 of 1948.) and M. M. Desai (in Misc. No. 64 of 1948)—for Petitioners.

Sir Noshervan Engineer, Advocate-General of India
—for the Dominion of India.

C. K. Daphtary, Advocate-General of Bombay
—for the Province of Bombay.

Order. — These are several petitions presented by different parties for writs of *certiorari* in respect of orders of requisition passed under Ordinance No. V [5] of 1947, being the Bombay Land Requisition Ordinance, 1947. A common question of law of considerable importance arises in these petitions, namely, whether the Governor of Bombay had any authority to promulgate the Ordinance, and, therefore, my learned brother Coyajee J. directed that notice should be given to the Dominion of India, and the Advocate-General of India has appeared before me on behalf of the Dominion of India. I decided to try this question as a preliminary issue in these matters and I have heard parties thereon. The matter arises in this way:

[2] Ordinance No. V [5] of 1947 is made under the authority conferred on the Provincial Legislature to enact laws with respect to requisition of land by a notification of the Governor-General of India being the Government of India, Ministry of Law, Notification No. F. 311-47-C. & G. dated 21st October 1947. It is contended that the Governor-General had no authority to issue this notification under S. 104, Government of India Act, as he has purported to do, and that consequently the Governor of Bombay did not derive any authority to make the Ordinance.

[3] In order to consider how far this argument is well-founded one has got to go back to the provisions of the Government of India Act.

That Act provides for the distribution of legislative powers between the Dominion Legislature and the Provincial Legislature. In Sch. 7 to that Act are set out, in three parts, matters in respect of which the Dominion Legislature, the Provincial Legislature and both the Legislatures can legislate, being the Federal Legislative List, the Provincial Legislative List and the Concurrent List respectively. But, exhaustive as these lists were intended to be, they could not conceivably comprise every object of legislation; and, therefore, provision was made for residual powers of legislation under S. 104, Government of India Act. That section provided that with respect to any matter which was not enumerated in any of the lists in Sch. 7 the Governor-General may by a public notification empower either the Dominion Legislature or the Provincial Legislature to enact laws. During the emergency created by the last war, the Defence of India Act and the Defence of India Rules were made which contained powers for requisitioning property; but, it was held by my learned brother Bhagwati J. that those provisions regarding requisition were *ultra vires* inasmuch as requisitioning was not one of the matters enumerated in any of the three Lists in Sch. 7 of the Government of India Act. This created a somewhat serious situation as the Government had, for the emergency created by the war, requisitioned numerous properties for public purposes. Accordingly the India (Proclamations of Emergency) Act, 1946, was passed on 14th February 1946. That Act provides for the amendment of S. 102, Government of India Act. That section deals with the powers of the Dominion Legislature, if an emergency is proclaimed; but those powers were, under the Act as it then stood, limited to matters enumerated in Sch. 7. The effect of the amendment was that during the period when a proclamation of emergency was in force the Dominion Legislature was empowered to make laws for any Province or part of a Province or for the whole of the Indian Dominion with respect to any matter not enumerated in Sch. 7. This amendment was made to date back to the commencement of Part III, Government of India Act, 1935, which was 1st April 1937; and power was given in the case of orders of Courts already made for a review of those orders on the footing that the law always was as set out in this amending Act.

[4] We next have another amendment to extend temporarily the powers of the Indian Legislature to make laws. That was made by the India (Central Government and Legislature) Act, 1946, which was passed on 26th March 1946. That Act in S. 2 thereof conferred on the Dominion Legislature powers to legislate with respect to matters

therein enumerated during the period mentioned in S. 4 thereof. Section 3 of the Act, which is the section with which we are concerned on the present petition, related to requisitioned land and it is in these terms:

3. Requisitioned Land—

(1) Notwithstanding anything in the Government of India Act, 1935, the powers of the Indian Legislature to make laws shall extend to the making of laws—

(a) providing, in relation to land in a province which, when the Act of the Indian Legislature known as the Defence of India Act, 1939, expires, is subject to any requisition effected under the rules made under that Act, for the continuance, until not later than the end of the period mentioned in section four of this Act, of all or any of the powers theretofore exercisable under the said Act of the Indian Legislature or the said rules; and

(b) providing, in particular, for the continuance as aforesaid of the power of the Governor-General in Council compulsorily to acquire any such land as aforesaid for any purposes directly and without the interposition of any Province

and any laws made by virtue of this sub-section may contain provisions with respect to offences against the laws, enquiries and statistics for the purposes of the laws, jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters dealt with by the laws, and fees in respect of any of those matters, but not including fees taken in any Court; and sub-ss. (2) to (4) of the last preceding section shall apply in relation to any such laws as they apply in relation to laws made under that section.

Now, as I read this section, it confers upon the Dominion Legislature power to make laws to the limited extent provided in cls. (a) and (b) of this sub-section. Clause (a) deals with lands which are already subject to any requisition and provides in respect thereof that the Dominion Legislature may make laws for the continuance of all or any of the powers which were formerly exercisable. It does not, to my mind, confer upon the Dominion Legislature any power to enact laws with regard to requisitioning in general. The period during which the Dominion Legislature can continue the powers already conferred by existing laws in respect of property which was then subject to requisition is limited to the period mentioned in S. 4. Then S. 4 says that the period shall be one year beginning with the date on which the proclamation of emergency in force ceases to operate, and if the Governor-General so notifies two years beginning with that date. Now the proclamation of emergency ceased to operate on 31st March 1946, and by a notification issued by the Governor-General on 8th March 1947, the period under S. 4 was extended to two years, beginning with 1st April 1946, i.e., to 31st March 1948. So that the position under this Act was that up to 1st April 1948, so far as requisitioning is concerned, the Dominion Legislature was entitled to continue in force legislation relating to requisition, in so far as it related to land which was already the subject of requisition. Under this power Ordinance No. XIX [19] of 1946 was

promulgated and was subsequently substituted by Act XVII [17] of 1947.

[5] It has been argued by Mr. Taraporewalla that inasmuch as power was conferred on the Dominion Legislature to legislate in respect of requisition of land, S. 104 cannot apply to requisition of land at all; and the Governor-General had no jurisdiction to provide by notification that either Dominion or the Provincial Legislature can legislate with regard to requisition of land. In the view I take of the India (Central Government and Legislature) Act, 1946, I do not agree with Mr. Taraporewalla that a general power was conferred upon the Dominion Legislature to legislate in respect of requisition of land up to 1st April 1948. Such power was no doubt conferred on that Legislature during the time the proclamation of emergency was in force; but thereafter the only power that the Legislature had with regard to requisitioning was to continue in force the existing legislation up to 1st April 1948, with regard to property which was subject to requisition on 26th March 1946, when the India (Central Government and Legislature) Act, 1946, was enacted. That being so, it is not necessary for me to consider the argument whether, in an emergency, if by an amendment of S. 102, Government of India Act, the powers of the Dominion Legislature were extended to matters not enumerated in Sch. 7, Government of India Act, the power of the Governor-General under S. 104 to deal with such matters is automatically taken away. In so far as the present Ordinance which is challenged is concerned, I am satisfied that it does not in any manner deal with any matter which is covered by the power of the Dominion Legislature regarding requisition. It was contended by Mr. Taraporewalla that, in any event, to the extent to which the Ordinance deals with the continuance of requisition, it covers a subject which was within the competence of the Dominion Legislature by reason of the India (Central Government and Legislature) Act, 1946. If it were so, it might have been that to that extent the Provincial Legislature had no jurisdiction to enact the Ordinance. Section 5 of that Ordinance which deals with continuance of requisition is in these terms:

"5. *Continuance of requisition.*—(1) Notwithstanding anything contained in the Requisitioned Land (Continuance of Powers) Act, 1947 (XVII of 1947), the Provincial Government may, by order in writing, direct that any land which was continued under requisition under the said Act, shall continue to be subject to requisition under this Ordinance when it is released from requisition under the said Act or ceases to be subject to requisition for any reason; and the Provincial Government may use or deal with the land so continued to be subject to requisition in such manner as may appear to it to be expedient."

It is plain that this provision takes effect only

when any provision made under the legislative powers of the Dominion for continuance of requisition comes to an end and not till then. Therefore, even with regard to the continuance of requisition the Ordinance does not in any way conflict with the power conferred on the Dominion Legislature to legislate in respect of requisition of land. That being my view, I am of the opinion that the Governor-General had authority to issue the notification whereby he conferred on the Provincial Legislatures power to enact laws with respect to requisition of land and Ordinance No. V [5] of 1947, which is promulgated in pursuance of the power so conferred on the Provincial Legislatures, is valid and operative.

[6] The costs of this issue which was argued in Misc. No. 2 of 1948 will be dealt with by me when I dispose of the petition.

R.G.D.

Order accordingly.

A. I. R. (36) 1949 Bombay 95 [C. N. 30.]

DESAI J.

In re Anant Mahadev Mandekar.

Indradatta Jogendranath Sen—Petitioner v. Commr. of Police, Greater Bombay—Respondent.

Crown Side Petition of 1947, Decided on 28th November 1947.

Bombay Public Security Measures Act (VI [6] of 1947), S. 3 — Notice under—Grounds furnished should be definite and precise—To say that detenu has been "inciting workers to commit acts of violence" is vague and insufficient to enable detenu to make representation against order of detention.

The whole object of furnishing grounds and particulars to the detenu under S. 3, would be frustrated unless they are definite and precise. They are intended to serve a definite purpose under S. 3, i. e., of enabling the detenu to make a representation against the order and that purpose cannot be served unless the detenu knows what exactly has moved the Government to deprive him of his liberty. [Para 8]

Where the notice served on the detenu under S. 3 gave the ground for his detention, to be that "he has been inciting workers to commit acts of violence and thereby acting in a manner prejudicial to public safety and tranquillity of Greater Bombay," without particularising the class of workers and mentioning the time during which the detenu was supposed to have incited them:

Held, that the notice was vague and indefinite and that the particulars given were not such as to enable the detenu to make a representation to the Provincial Government against the order and afford him the earliest opportunity of doing so: Cri. Appln. No. 524 of 1947, decided on 29th Oct. 1947 (Bom.), *Foll.*; A. I. R. (32) 1945 Bom. 212 (F. B), *Ref.* [Para 10]

Rajni Patel — for Petitioner.

C. K. Daphtary, Advocate-General—for Respondent.

Order.—The petitioner is the editor of an English fortnightly called "*New Spark*" and he is a close friend of one Anant Mahadeo Mandekar, the detenu in this case, who is hereinafter referred to as the detenu. Prior to his detention,

the detenu was a record clerk in the New Kaiser-i-Hind Mills. In pursuance of a detention order dated 12th May 1947, issued against him by respondent 1, who is the Commissioner of Police, Greater Bombay, the detenu has been detained since 15th May 1947, under cl. (a) of sub-s. (1) of S. 2, Bombay Public Security Measures Act, 1947. The petition is filed for an order that the detenu be set at liberty.

[2] Section 2, Bombay Public Security Measures Act, 1947, provides as follows :

"2. (1) The Provincial Government may, if it is satisfied that any person is acting in a manner prejudicial to the public safety, the maintenance of public order, or the tranquillity of the Province or any part thereof, make an order—

(a) directing that he be detained."

Section 3 of the said Act provides that where an order is made in respect of any person under cl. (a) of sub-s. (1) of S. 2, the Provincial Government shall, as soon as may be, communicate to the person affected by the order the grounds on which the order has been made, without disclosing facts which it considers against the public interest to disclose, and such other particulars as are in its opinion sufficient to enable him to make a representation to the Provincial Government against the order and inform him of his right to make such representation and afford him the earliest opportunity of doing so.

[3] The Order No. 38 of 1947 under S. 2 (1) (a) of the said Act served on the detenu is on a stereotyped form in which the name of the detenu is inserted.

[4] The notice served on the detenu under S. 3 of the said Act dated 12th May 1947, is in the following terms :

"In pursuance of S. 3, Bombay Public Security Measures Act, 1947 (Bom. VI of 1947), you are informed that the grounds on which an order of detention has been made against you under cl. (a) of sub-s. (1) of S. 2 of the said Act, are :

That you have been inciting workers to commit acts of violence and thereby acting in a manner prejudicial to public safety and tranquillity of Greater Bombay."

[5] It will be observed that under S. 3 it is the duty of the Provincial Government to communicate to the person affected by the order the grounds on which the order has been made as also to give particulars. In *Emperor v. Keshav Gokhale*, 47 Bom. L. R. 42 : (A. I. R. (32) 1945 Bom. 212 : 46 Cr. L. J. 608 F. B.) a Full Bench of our High Court decided as follows :

"Where, on a perusal of an order passed under R. 26, Defence of India Rules, 1939, it becomes clear that the authority or officer making the order has not applied its or his mind as required by the rule, the order is invalid: *King Emperor v. Sibnath Banerjee*, 1944 F. C. R. 1 : (A. I. R. (30) 1943 F. C. 75 : 45 Cr. L. J. 341), followed."

"The obligation to consider reasons or grounds for making an order and to be satisfied upon materials laid before the officer or authority making it or within his cognizance is a condition precedent to the making of

an order, which in absence of the condition is a nullity. *Rex v. Secretary of State for Home Affairs: Ex parte Greens* (1942) 1 K. B. 87, followed."

"Hence, where a District Magistrate takes a ready made cyclostyled form, which sets out mechanically the four conditions prescribed by R. 26, and which refers by its language to a plurality of persons, and fills in the schedule the name of the person ordered to be detained, the Magistrate does not exercise any executive discretion or make a quasi-judicial consideration of the facts pertinent to the case, and the order passed is no order at all."

[6] It is contended that for the reasons stated in the said case *Emperor v. Keshav Gokhale*, 47 Bom. L. R. 42 : (A. I. R. (32) 1945 Bom. 212 : 46 Cr. L. J. 608 F. B.) respondent 1, though he gave the grounds on which he made the said order, failed to apply his mind as required by law and, therefore, the grounds given by respondent 1 cannot be deemed to be any grounds at all and that therefore the order is bad. For the reasons hereinafter stated, it is not necessary for me to give any finding as regards this contention.

[7] The second contention raised by the petitioner is that the notice under S. 3 of the said Act is bad on the ground that it is vague and indefinite and does not comply with the provisions of S. 3 of the said Act.

[8] So far as this contention is concerned, there is the judgment delivered in *In re Bhayyaji Kulkarni*, Crl. Appln. No. 524 of 1947, decided on 29th October 1947, by the learned Chief Justice and Gajendragadkar J. where their Lordships had to consider the language of the notice under S. 3 given by the District Magistrate, East Khandesh, which was in terms very similar to the language used in the present case. Ground No. 2 given in the said notice is as follows :

"That you are acting in a manner prejudicial to the public safety and maintenance of public order and tranquillity of Amalner town by inciting workers to violence."

As regards this, the learned Chief Justice in his judgment said :

"When we come to ground (2) it will be noticed that it does not state the class of workers whom the person detained is alleged to be inciting : nor does it state the place at which these workers are supposed to be working. 'Workers' is an extremely comprehensive and all-embracing expression. In these days one might almost say that everybody is a worker, and it seems difficult to understand why such an expression was used when proper and adequate information could easily have been supplied to the person detained by the use of a proper expression. The Government Pleader has contended that further to particularise 'workers' would have been really to give particulars or to state facts which the Government might not have wanted to do in public interest. We cannot accept that argument. The whole object of furnishing grounds would be frustrated unless they are definite and precise. They are intended to serve a definite purpose under S. 3 and that purpose cannot be served unless the detenu knows what exactly has moved Government to deprive him of his liberty. In

our opinion therefore ground (2) is also vague and indefinite."

[9] I consider myself bound by that judgment, and I respectfully agree with what their Lordships said. I hold that for the reasons aforesaid the notice given under S. 3 of the said Act in this case was vague and indefinite and that the particulars given were not such as to enable the detenu to make a representation to the Provincial Government against the order and afford him the earliest opportunity of doing so. It is undoubtedly true that the particulars to be given are such as are in the opinion of the Provincial Government sufficient. But the Government nevertheless is bound to give particulars. Such particulars as the Government did give in this case were vague and indefinite and therefore could not be described as any particulars at all.

[10] It will be observed that the notice does not mention the class of workers or the locality in which the workers were residing or working. Supposing that the workers were residing or working in a locality, which the detenu could prove to the satisfaction of the proper authority he never visited, or that the class of workers whom it was alleged that he incited were workers with whom he never came in contact or were workers who were not likely to listen to the detenu by reason of their social status or political views, then the authority concerned might, on a proper representation being made by the detenu and after the necessary investigation held by him in that behalf come to the conclusion that there was no case made out for keeping the detenu in detention. The next point to notice is that it is not mentioned in the particulars the time during which the detenu is supposed to have incited the workers. If those particulars had been given, the detenu might have satisfied the authority concerned that at that particular period of time he never visited the locality at all but that in fact he was busily engaged in a totally different locality from the locality in question. This shows how necessary it is that proper particulars should have been given to the detenu.

[11] I asked the learned Advocate-General how he proposed to distinguish the language of the notice in this case from the language of the notice given in the Full Bench case under S. 3 of the said Act, but he was unable to point out any distinction.

[12] This being my view, I think the order of detention cannot be justified. I therefore order that the detenu be set at liberty immediately and that respondent 1 may be ordered to pay to the petitioner the costs of the petition.

[13] Respondent 2 in this case is the Superintendent, Worli Temporary Prison. But I do not

think it is necessary to pass any order for costs against respondent 2 and indeed no such order is asked for against him.

R.G.D.

Rule made absolute.

***A. I. R. (36) 1949 Bombay 97 [C. N. 31.]**
FULL BENCH

CHAGLA AG. C. J., BAWDEKAR AND GAJENDRAGADKAR JJ.

Waman Vishwanath Bapat v. Yeshwant Tukaram.

First Appeal No. 345 of 1944, Decided on 12th December 1947.

*Decree — Instalment decree — Default clause — Relief against forfeiture — Court's power to grant — Mortgage decree on award — On default of two instalments, mortgaged property to be sold for balance found due — Default committed — Notice under O. 21, R. 66 for sale of property — Judgment-debtor tendering money due on defaulted instalments and praying for relief against breach — Court cannot grant relief — Case is not one of penalty or forfeiture — Civil P. C. (1908), O. 20, R. 11 — Contract Act, (1872), S. 74 : 27 Bom. L. R. 1453 : A. I. R. (13) 1926 Bom. 81 : 91 I. C. 990 and 46 Bom. 463 : A. I. R. (9) 1922 Bom. 170 : 64 I. C. 570, **OVERRULED.**

A Court of equity can relieve against penalties or against forfeitures. But the question that has got to be determined in such a case is whether a certain obligation undertaken by a judgment-debtor is in the nature of a penalty or whether it is the result of a concession conferred upon him by the decree-holder. [Para 8]

A mortgage decree passed on award was made payable by certain fixed instalments on or before fixed dates. There was a default clause which was to operate on the failure to pay any two instalments. The judgment-debtor failed to pay the instalments in the sums fixed or on due dates. But from time to time he paid certain sums which were accepted by the decree-holder. But there was nothing to show that the decree-holder accepted these payments not towards what was due to him under the decree but in waiver of the breach committed by the judgment-debtor. On default being committed, the decree-holder applied for the execution of the decree and the mortgaged property was ordered to be sold and notice was issued under O. 21, R. 66. On getting certain amount from the judgment-debtor, the decree-holder allowed the execution to be dismissed. Again there was a default and the decree-holder took out execution and notice under O. 21, R. 66 was issued. Before the date fixed for the sale of the property the judgment-debtor presented an application submitting among other grounds that he was bringing into Court the sum of Rs. 1,210 the amount then due under the various instalments, that that amount should be accepted and he should be relieved against the breach he had committed in payment of the instalments on their respective due dates.

Held, that it was not the case of a penalty or forfeiture. The obligation undertaken by the judgment-debtor was a result of concessions given by the decree-holder and therefore the judgment-debtor was not entitled to relief against the breach committed by him: 27 Bom. L. R. 1453 : A. I. R. (13) 1926 Bom. 81 : 91 I. C. 990 and 46 Bom. 463 : A. I. R. (9) 1922 Bom. 170 : 64 I. C. 570, **OVERRULED.** [Paras 5, 11]

Annotation : ('44-Com.) Civil P. C., O 20 R 11 N 10; ('46-Man.) Contract Act, S 74 N 10.

S. Y. Abhyankar—for Appellant.

P. S. Joshi for S. G. Patwardhan, and N. D. Dange (for Nos. 2 to 5) — for Respondents.

Chagla Ag. C. J. — The facts leading up to this appeal are that on 20th August 1936, the appellant obtained a mortgage decree for Rs. 7,303-7-0. That decree was made payable by certain instalments. The first instalment was to be made payable on 1st May 1937. The instalment fixed was Rs. 300, the next instalment of Rs. 200 on or before 1st May 1938, the third instalment of Rs. 300 on or before 1st May 1939, the fourth instalment of Rs. 500 on or before 1st May 1940 and the subsequent instalments of Rs. 500 each payable on or before 1st May of every subsequent year.

[2] There was a default clause which was to operate on the failure to pay any two instalments. The judgment-debtor committed default and on 2nd June 1941, the decree-holder filed a darkhast applying for the execution of the decree. A notice was issued under O. 21, R. 22. The judgment-debtor did not appear in answer to that notice and on 2nd August 1941, the mortgaged property was ordered to be sold and notice was issued under O. 21, R. 66. Thereafter the decree-holder obtained a sum of Rs. 100 from the judgment-debtor and he decided not to proceed with his darkhast and the darkhast was dismissed. Thereafter certain amounts were paid by the judgment-debtor to the decree-holder. On 11th October 1943, the present darkhast was filed by the decree-holder and again the mortgaged property was ordered to be sold and a notice was issued under O. 21, R. 66. The date for the sale of the property was fixed on 12th June 1944. Before that on 9th June 1944, the judgment-debtor presented an application submitting among other grounds that he was bringing into Court the sum of Rs. 1,210, the amount then due under the various instalments, that that amount should be accepted and he should be relieved against the breach he had committed in payment of the instalments on their respective due dates.

[3] The learned Civil Judge, Senior Division, took the view that this was a case where the judgment-debtor should be relieved against the penalty provided under the decree and ordered the darkhast to be struck off on the amount paid by the judgment-debtor being credited to the decree-holder. The appeal came before my brother Gajendragadkar J. and Macklin J. and as there are conflicting decisions of this Court the matter was referred to this Full Bench.

[4] Mr. Abhyankar for the appellant has contended that this is a case where effect should be given to the provisions and terms of the decree and that the judgment-debtor having made default, the rights which accrued to the decree-holder should be strictly enforced. On the other hand, the Government pleader has contended that the judgment-debtor should be relieved

from the consequences of the breach committed by him in not making payments on their respective due dates.

[5] There are two conflicting views which have been taken by this Court on this question and the two protagonists of these two views are Sir John Beaumont and Sir Norman Macleod, two learned Chief Justices of this Court. Sir John Beaumont in *Burjorji Shapurji v. Madhavlal Jesingbhai*, 58 Bom. 610; (A.I.R. (21) 1934 Bom. 370) was considering a case where a certain amount was made payable under the decree and it was provided that if a certain amount was paid on the dates specified, then satisfaction was to be entered up. In default of payment on the due date, the full amount under the decree became payable. The judgment-debtor failed to pay the smaller amount on the due date and the decree-holder applied for execution and the question arose whether the delay in payment on the due date should be condoned and Sir John Beaumont took the view that what the decree-holder had done was to have made a concession to the judgment-debtor, the concession being that if he paid the smaller amount by a particular date, full satisfaction would be entered up, but in default of payment on the due date the amount actually due under the decree would become payable, and the learned Chief Justice took the view that the provision for the payment of the full amount in default of payment of the smaller amount on the due date was not in the nature of a penalty and the Court could not relieve against the breach committed in the failure to pay the amount on the due date. At p. 617 the learned Chief Justice sets out the law which he says is not open to any serious question and what he says is this :

"If there is an agreement to pay a sum of money by a particular date with a condition that if the money is not paid on that date a larger sum shall be paid, that condition is in the nature of a penalty against which a Court of equity can grant relief and award to the party seeking payment only such damage as he has suffered by the non-performance of the contract. But if, on the other hand, there is an agreement to pay a particular sum followed by a condition allowing to the debtor a concession, for example, the payment of a lesser sum, or payment by instalments, by a particular date or dates, then the party seeking to take advantage of that concession must carry out strictly the conditions on which it was granted, and there is no power in the Court to relieve him from the obligation of so doing."

[6] In this case also the decree provides for the payment of a particular sum. It proceeds to confer a concession upon the debtor, viz. if he pays the decretal amount by certain instalments, then he need not pay the full decretal amount at once. But if he fails to pay those instalments on their respective due dates, then the concession disappears and he is under

an obligation to pay the full amount and what we are now asked by the Government Pleader to do is to relieve the judgment-debtor from his obligation to pay the instalments on their respective due dates, he having obtained the concession as a result of undertaking that obligation.

[7] Sir John Beaumont also considered the same question in an unreported judgment, *Pari Chimanlal Dholidas v. Chimanlal Bhudardas Shah*, First Appeal No. 244 of 1939, decided by Beaumont C. J. and Sen J. on 29th November 1940. There he points out that there is no general power in Courts of equity to disregard agreements which it thinks unjust and he also points out that at the present time the rules of equity are almost as well settled as rules of the common law and he sounds a note of warning that more harm than good would be done by allowing Courts to interfere with agreements made between the parties merely because the Court may think a particular agreement unfair. The principle enunciated by him applies not only to consent decrees but also to decrees passed by the Court *in invitum*. Whereas in the case of a consent decree, it is the question of the sanctity of contract, in the case of a decree it is the question of a solemn adjudication by the Court of the rights of parties.

[8] The other view found favour with Sir Norman Macleod and he gave expression to that view in *Narayan v. Rajimal*, 27 Bom. L. R. 1453 : (A. I. R. (13) 1926 Bom. 81). In that case a consent decree provided for the payment of a sum in certain fixed instalments. It also provided that on failure to pay two instalments the plaintiff was entitled to take possession of certain lands. There was a delay of a few days in the payment of two instalments. The plaintiff accepted the instalments and then he next applied to get possession of the lands and Sir Norman Macleod and Coyajee J., held that the default should be excused and the defendants relieved against forfeiture and Sir Norman Macleod expressed himself rather emphatically at p. 1455 that he was always opposed to the suggestion that one Court can bind all Courts in future by deciding that no consent decree can possibly be departed from even when justice and equity demanded it. According to him, it was the privilege of this Court to administer equity, and, in following the principles of equity, to relieve against forfeiture, if it considers the nature of the case requires it. With great respect, what the learned Chief Justice overlooked was whether there was any penalty provided in the consent decree. It is not disputed and it cannot be disputed that a Court of equity can relieve against penalties or against forfeiture. But the question that has got to be determined is whether a cer-

tain obligation undertaken by a judgment-debtor is in the nature of a penalty or whether it is the result of a concession conferred upon him by the decree-holder.

[9] The same view of the law was taken by Sir Norman Macleod in a previous case reported in *Narsinha Gopal v. Balvant Madhav*, 46 Bom. 463 : (A. I. R. (9) 1922 Bom. 170). There again there was an instalment decree. There was failure to pay instalment on the due date and Sir Norman Macleod and Shah J., took the view that the delay should be excused and the judgment-debtor should be relieved from the consequences of the default.

[10] The more extreme view is to be found in two earlier decisions, one is *Shirekuli Timapa Hegda v. Mahablya*, 10 Bom. 435 where Birdwood and Jardine JJ., went to the length of suggesting that the doctrine of penalties was not applicable to stipulations contained in decrees, and that the plaintiff was entitled to recover, and in *Lachiram v. Jana Yesu*, 16 Bom. L. R. 668 : (A. I. R. (1) 1914 Bom. 127), Sir Basil Scott and Beaman J., refused to excuse delay and save the judgment-debtor from the consequences of default on the ground that a consent decree could only be varied by consent. It is unnecessary to consider in this appeal whether these two decisions have not gone too far in restricting the jurisdiction of the Court to give relief against penalties. It is sufficient to hold that *Narayan v. Rajimal*, 27 Bom. L. R. 1453 : (A. I. R. (13) 1926 Bom. 81) and *Narsinha Gopal v. Balvant Madhav*, (46 Bom. 463: A. I. R. (9) 1922 Bom. 170) were wrongly decided and must be overruled.

[11] A point has also been urged as to whether the decree-holder waived the breach by accepting payments. The facts show that from 1938 till 11th October 1943, the decree-holder accepted payments from time to time from the judgment-debtor. On the default having taken place admittedly the whole decretal amount became due and payable and there is nothing to show on the record that the decree-holder accepted these payments not towards what was due to him under the decree but in waiver of the breach committed by the judgment-debtor. As a matter of fact, the learned Judge below has found as a fact that these payments were not accepted as a waiver of the decree-holder's rights and we see no reason to differ from that finding of fact.

[12] The result is that the appeal must be allowed, the order of the lower Court set aside and the Darkhast sent back to the executing Court to be disposed of according to law. Respondents must pay the costs of the appellant.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Bombay 100 [C. N. 32.]

BHAGWATI J.

Dattatraya Pandurang Datar — Plaintiff
v. Hari Keshav Gokhale and others — Defendants.

O. C. J. Suit No. 1588 of 1945, Decided on 31st March 1948.

Tort — Malicious prosecution — "Prosecution," what amounts to—Lodging of first information by defendant to police of offence of theft — Suspicion laid on plaintiff—Police investigation and arrest of plaintiff—Plaintiff remanded in custody — Plaintiff discharged from custody, on application by police, for want of evidence—Held that there was no prosecution by defendants.

That the plaintiff was prosecuted by the defendants is an essential *sine qua non* of an action for malicious prosecution. [Para 10]

The defendants lodged a first information to the police, of a theft at their shop. In it they laid their suspicion on the plaintiff, an employee at the defendants' shop. Upon this information the police entered into investigation of the offence under Chap. V of the Bombay City Police Act. The plaintiff was arrested and on application to the Magistrate was remanded in custody. There being no evidence forthcoming to show that the plaintiff had committed the offence, upon the application by the police for discharge, the bail bond was cancelled and the plaintiff discharged. In a suit by the plaintiff against the defendants for damages for malicious prosecution.

Held that the defendants did not prosecute the plaintiff. The defendants did nothing more than merely lay the information before the police and it was the police, that after being satisfied that there was reason to suspect the commission of the offence, proceeded to investigate the facts and circumstances of the case, took the necessary orders for remand which in law they were bound to do and ultimately discharged the plaintiff, there being no sufficient evidence implicating him in the commission of the offence in spite of their best endeavours to see if there was any evidence forthcoming in that behalf: A. I. R. (17) 1930 Cal. 392, *Rel. on; Case law considered.* [Para 9]

S. M. Shah—for Plaintiff.

S. T. Desai — for Defendants.

Judgment.—This is a suit filed by the plaintiff against the defendant to recover Rs. 7,500 as and by way of damages for malicious prosecution. The plaintiff was employed by the defendants on or about 6th June 1945, at their jewellery shop as a part-time employee attending the shop only in the mornings. That was a temporary employment presumably on probation and the employment was confirmed on or about 13th June 1945. It appears that on or about 16th June 1945, some gold ornaments which had been entrusted by the customers to the defendants were missing and the plaintiff was amongst other employees questioned by the proprietor of the defendants, one Gharpure. Gharpure attended the shop and inquired of the plaintiff as well as the other employees what they knew about the theft of the ornaments and

the plaintiff protested his innocence in the matter of the charge. On the night of 16th June 1945, one Anant Sakharam Joshi, a clerk of the defendants, gave the first information to the police and stated therein that all the other employees of the defendants were old and trustworthy but that the plaintiff was a recent employee of the defendants and that by certain actions of his which were observed in the shop the suspicion fell on the plaintiff that he might be the criminal. That fact was freely and frankly stated by Joshi in the first information which he gave to the police on the night of 16th June 1945. This was a cognizable offence and the police entered into investigation of the offence under Chap. V, Bombay City Police Act. The police-officer in accordance with the provisions of S. 60 of the Act appears to have had reason to suspect the commission of the offence and proceeded to carry on the investigation in the matter of the offence. He was not entitled to keep the plaintiff in custody for more than 24 hours and therefore on 18th June 1945, he made an application to the Presidency Magistrate, 8th Court, Girgaum, for a remand of the plaintiff in custody, which remand was granted up to 2nd July 1945. The same story was repeated on 2nd and 9th July 1945, the ultimate order for remand being up to 16th July 1945. Even up to 16th July 1945, the police were not in a position to do anything against the plaintiff, there being no evidence forthcoming to show that he had committed the offence, and therefore on 16th July 1945, the police made an application for discharge and cancellation of the bail bond of the plaintiff before the same Magistrate, which was granted. The bail bond was cancelled and the plaintiff was discharged. This is what happened in the matter of this first information given by Joshi, the clerk of the defendants, and the investigation by the police in the matter of the offence alleged to have been committed by the plaintiff.

[2] These are the circumstances which have been alleged by the plaintiff as giving him a cause of action for malicious prosecution against the defendants, and it is on these circumstances that the plaint has been based. After recounting in paras. 3, 4, 5, 6 and 7 the facts with regard to the conduct of the defendants in the matter of this charge the plaintiff proceeds to say that as a result of the charge made by the defendants against him and his consequent detention in jail, he lost his service with the Phoenix Mills, Ltd., Bombay, and also lost the benefit of the provident fund to which he was contributing. He says;

"As a result of the said wrongful and malicious action of the defendants he suffered very greatly in body, mind and his reputation in addition to the loss of his employment and the benefit of the provident fund."

He states his cause of action in para. 10 of the plaint :

"The plaintiff states that the complaint made by the defendants to the said police authorities against the plaintiff in connection with the said patli besides being false in its particulars as regards the articles actually missing from the said shop was actuated by malice and entirely baseless without any cause whatever much less a reasonable and probable cause."

He further proceeds to state :

"The plaintiff further states that as a result of the application for remand made by the said police authorities to the said Presidency Magistrate, the said learned Magistrate took cognizance of the offence alleged against the plaintiff as aforesaid and that the said learned Magistrate later on discharged the plaintiff in the circumstances hereinabove described."

[3] I may at this stage observe that besides the narration of the circumstances which I have already narrated above, there is nothing averred in the plaint by way of any conduct on the part of the defendants or any of their employees which instigated or induced the police to do anything by way of taking proceedings against the plaintiff, the only thing averred in the plaint being that Gharpure had stated that the matter would be reported to the police and that the action of the defendants in the matter of the first information which they gave to the police was wrongful and malicious. There was no other complaint made by the defendants before the police besides the first information which was given by Joshi, the clerk of the defendants, on the night of 16th June 1945. So far as the plaint goes, there was nothing further done by the defendants besides giving that first information to the police and there end, so far as the plaint is concerned, all the circumstances which are alleged by the plaintiff against the defendants.

[4] The defendants disputed their liability to the plaintiff *inter alia* on the ground that the plaintiff was not prosecuted by them. Amongst the several issues which were raised by the defendants at the hearing, was issue 2, viz. "Whether the plaintiff was prosecuted by the defendants?" and, on an application of counsel for the defendants I ruled that that issue should be tried as a preliminary issue.

[5] Counsel for the plaintiff as well as the defendants have addressed me at considerable length on this aspect of the case. Counsel for the defendants has strenuously urged that the only thing which his clients did was to give the first information to the police on the strength of which no doubt the police acted in the exercise of their powers under Chapter V, Bombay City Police Act, but what the police did thereafter was purely the concern of the police, they having had nothing further to do in the matter. After the first information was given by Joshi on behalf of the defendants to the police, the

police entered into the investigation and because the investigation could not be finished within 24 hours of the arrest of the plaintiff, an application for remand was made as it should have been done on 18th June 1945. The investigation in the matter of the alleged offence could not be completed within the period of remand and therefore successive applications were made by the police for further remand of the plaintiff in police custody. It was only when the police found that no evidence was available as regards the complicity of the plaintiff in the offence that the police asked for a discharge of the plaintiff, which was accordingly granted by the learned Magistrate. Counsel for the defendants has therefore contended that merely giving information to the police in the manner it was done by the defendants was not the launching of a prosecution by the defendants against the plaintiff.

[6] In support of his contention counsel for the defendants relied upon *Ahmedbhai v. Framji Edulji*, 28 Bom. 226 : (5 Bom. L. R. 940), and the observations of Chandavarkar J. at p. 234, viz.:

"... the authorities referred to by the Subordinate Judge in his judgment show that 'a prosecution commences when a complaint is made' (*Imperatrix v. Lakshman Sakharam*, 2 Bom. 481), 487 and that it is not necessary, in order to maintain an action for malicious prosecution, that the charge was acted upon by the Magistrate. It is enough if the charge was made to the Magistrate with a view of inducing him to entertain it (*Addison on Torts*, 5th Ed., p. 200)."

It was therefore argued that in this case there was no commencement of the prosecution because the only thing which was done by the defendants was to give the first information to the police and what was done by the police by way of the application for remand before the Magistrate was not a step towards the prosecution of the plaintiff taken by the defendants themselves but was a step taken by the police in the course of their investigation into the offence. Counsel for the defendants also relied upon a passage from my judgment in *Dhanjishaw Karani v. Bombay Municipality*, 47 Bom. L. R. 304 : (A. I. R. (32) 1945 Bom. 320), (p. 312) :

"To prosecute is to set the law in motion, and the law is only set in motion by an appeal to some person clothed with judicial authority in regard to the matter in question. The defendant must be the person who set the law in motion against the plaintiff. It is not necessary, however, that he should be a party to the proceedings. In the case of malicious prosecution by way of indictment in the name of the King, the person liable is the prosecutor to whose instigation the proceedings are due. Instigating a prosecution is, however, to be distinguished from the act of merely giving information on the strength of which a prosecution is commenced by some one in the exercise of his own discretion. The gist of the action for malicious prosecu-

tion is that the defendant sets the Magistrate in motion."

The distinction according to the submission of the counsel for the defendants was between instigating a prosecution by the party himself and giving of information to the police on the strength of which the prosecution was commenced by the police, if at all it was so done, in the exercise of their own discretion, because it has been laid down in S. 60, Bombay City Police Act, that the officer in charge must have reason to suspect the commission of an offence which he is empowered to investigate, and only if he has reason to suspect the commission of that offence he would forthwith proceed to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender. In this case, therefore, it was argued that the defendants merely laid the information before the police officer and beyond stating that they suspected the plaintiff did nothing more. It was the police officer before whom the information was laid that having regard to the circumstances of the case came to the conclusion that he had reason to suspect the commission of the offence which he was empowered to investigate and therefore proceeded to investigate the facts and circumstances of the case and to take such measures as may be necessary for the discovery and arrest of the offender. The arrest of the plaintiff and also the applications for remand of the plaintiff into police custody which were made from time to time were made by the police officer in the course of the investigation and the defendants had nothing to do with the same.

[7] In further support of his contention, counsel for the defendants drew my attention to the case of *Nagendra Nath Ray v. Basanta Das Bairagua*, 57 Cal. 25: (A. I. R. (17) 1930 Cal. 392) which curiously happens to be a case almost on all fours with the present case before me. There the police had arrested the plaintiff on information supplied by the defendant suspecting the plaintiff immediately after theft had been committed in his house, but the Magistrate had to discharge the plaintiff as the police submitted a final report not finding any evidence connecting the plaintiff with that theft. The plaintiff therefore filed a suit for malicious prosecution and the Court held that the suit by the plaintiff for damages for malicious prosecution could not lie against the defendant for assuming that there was "prosecution" within the meaning of "malicious prosecution," as the expression was used in connection with suits of that nature, it was impossible to hold that the defendant was liable for damages, for there was not an iota of evidence to suggest that he ever went beyond giving a true

information of the occurrence and also a true statement of the fact that he suspected the plaintiff. The Court also held that the plaint itself was liable to be thrown out, as there was no prosecution of the plaintiff at all, as police proceedings were distinct from "malicious prosecution." The learned Judge, Mukerji J., relied upon the Privy Council decision in *Gaya Prasad Tewari v. Bhagat Singh*, 35 I. A. 189: (30 ALL. 525 P. C.) in support of the last proposition which he enunciated in his judgment. I need not go into the details of the reasoning of this judgment of Mukerji J. which he has fortified by reference to two Privy Council cases, viz. *Balbhadar Singh v. Badri Sah*, 30 C. W. N. 866: (A. I. R. (13) 1926 P. C. 46) and *Gaya Prasad v. Bhagat Singh*, 35 I. A. 189: (30 ALL. 525 P. C.)

[7a] The first of these cases was particularly relied upon by counsel for the plaintiff as enunciating that in any country where as in India prosecution is not private, an action for malicious prosecution in the most literal sense of the word cannot be raised against any private individual, but giving information to the authorities, which naturally leads to prosecution is just the same thing; and it was sought to be argued on the strength of this dictum of their Lordships of the Privy Council that giving of information to the authorities, viz, the police here, by laying the first information before them on the night of June 16, 1945, which naturally led to the prosecution of the plaintiff by the police making the applications for remand of 18th June 1945, 2nd July and 9, 1945, was just the same thing. It was therefore argued that the prosecution was launched by the defendants against the plaintiff. If the prosecution was launched and it commenced by the application for remand which was made before and was entertained by the Magistrate in the manner it was done, the defendants could not be heard to say that they had not prosecuted the plaintiff. These very observations of their Lordships of the Privy Council were considered by Mukerji J. in the case of *Nagendra Nath Ray v. Basanta Das Bairagua*, 57 Cal. 25: (A. I. R. (17) 1930 Cal. 392), and the learned Judge held that there was sufficient in the observations of their Lordships of the Privy Council to indicate that proceedings before the police were proceedings anterior to "prosecution," in view of what their Lordships had said, viz., "information to the authorities which naturally leads to prosecution" and "so far as the police were concerned, there was ample cause for the initiation of prosecution proceedings." The case before their Lordships of the Privy Council in *Balbhadar Singh v. Badri Sah*, 28 Bom. L. R. 921: (A. I. R. (13) 1926 P. C. 46), was a peculiar case where certain information which had been given before the police and which was the start-

ing point of the proceedings taken by the police against the plaintiff there was alleged to have been definitely engineered by the defendant and it was held that under those circumstances the defendant could not take shelter under the circumstance that the prosecution was a prosecution launched by the Crown and not by any private individual. The matter has been particularly dealt with by their Lordships of the Privy Council in the other case which was referred to by Mukherji J., viz. *Gaya Prasad Tewari v. Bhagat Singh*, 35 I. A. 189 : (30 ALL. 525 P. C.), and their Lordships have there categorically stated that the question in all cases of this kind must be, who was the prosecutor? and the answer must depend upon the whole circumstances of the case. Their Lordships in that judgment quoted a passage from a decision of the Madras High Court in *Narasinga Row v. Muthaya Pillai*, 26 Mad. 362 : (12 M. L. J. 389), and said (p. 192) :

"It will be convenient to refer at once to the decision of the Madras High Court (*Narasinga Row v. Muthaya Pillai*, 26 Mad. 362 : 12 M. L. J. 389) which the learned Judicial Commissioner appears to have followed with some reluctance. The judgment is in these terms : The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case, though defendant 1 may have instituted criminal proceedings before the police, he certainly did not prosecute the plaintiff. He merely gave information to the police and the police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act and no action lies against him for malicious prosecution."

Their Lordships proceeded to observe (p. 192) :

"The principle here laid down is sound enough if properly understood and its application to the particular case was no doubt justified; but, in the opinion of their Lordships, it is not of universal application. In India the police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the police, and the police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution."

It is only in those cases where besides these circumstances some further circumstances are found against the defendant that their Lordships further observe (p. 192) :

"But if the charge is false to the knowledge of the complainants, if he misleads the police by bringing suborned witnesses to support it, if he influences the police to assist him in sending an innocent man for trial before the Magistrate, it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him."

This, in my opinion, is the correct method of approach. If the defendant does not go beyond what he believes to be the correct information to

the police and the police without interference on his part think fit to prosecute, it would certainly be improper to make him liable for damages for the prosecution, and in the case before me having regard to the averments in the plaint the plaintiff has averred nothing more than this. I may at the cost of repetition say that the only averments against the defendants are, even if they can be spelt out from what has been stated therein, that the defendants laid the first information before the police on June 16, 1945, and various applications for remand were made by the police during the course of their investigations into the offence and ultimately the plaintiff was discharged because no evidence was forthcoming. These averments do not bring the case of the plaintiff against the defendants into the latter category which their Lordships discussed, viz. that the charge was false to the knowledge of the complainant, or that the complainant misled the police by bringing suborned witnesses to support it, or that he influenced the police to assist him in sending an innocent man for trial before the Magistrate, etc. On the state of the pleadings as they are before me, and I am entitled to take them on this plea of demurrer as the truth, the whole truth and nothing but the truth, without adding anything to or embellishing them in any manner whatever, the only thing which can be said about the defendants is that they gave the information to the police and they were the persons on whose information the police-officer started his investigation.

[8] It may be observed while considering this aspect of the case that counsel for the plaintiff sought to draw a distinction between what are cognizable offences and what are non cognizable offences. He said that all the authorities which were cited by counsel for the defendants were in connection with non-cognizable offences, where the Magistrate would take cognizance of the offence if satisfied about the same, only on a complaint being filed in respect of the same by the complainant. He contended that in the cases of cognizable offences the police-officer before whom the information was laid was entitled to enter into the investigation of the case and the moment he made an application for remand, as was done in this case on 18th June 1945, the Magistrate took cognizance of the offence and the prosecution was launched. He further contended that in the case of cognizable offences the commencement of the prosecution against the accused was the application for remand made by the police when the investigation could not be completed by them within 24 hours of the arrest of the accused. That commencement of the prosecution was no doubt by the police, but it was really at the instigation of the party who

laid the information before the police and therefore the defendants were in this case liable as having instituted the prosecution through the police on 18th June 1945, when the application for remand was made by them before the learned Magistrate. I am unable to accept this contention of counsel for the plaintiff. Even though in the case of a non-cognizable offence the complainant instigates the prosecution by filing a complaint before the Magistrate and asking him to issue the necessary process, in the case of a cognizable offence where information is given by the complainant to the police, in the manner it was done in this case, the only thing which the complainant does is to lay the information before the police. No doubt in the first information which he lays before the police-officer he narrates all the circumstances of the case and he also to the best of his knowledge, information and belief states whom he suspects in the matter of the commission of the alleged offence, but it is merely the information which he has laid before the police-officer. The police-officer is not merely his agent or a *conduit pipe*. The police-officer has under S. 60, Bombay City Police Act an independent volition of his own. He has got to be satisfied that there is reason to suspect the commission of the offence. It is open to the police-officer to say that on the information laid before him, there is no reason to suspect the commission of the offence and he would not act any further in the matter of investigation. It is only when after applying his mind on the first information, he comes to the conclusion that there is reason to suspect the commission of the offence, that in terms of that section he proceeds to investigate the facts and circumstances of the case and to take such measures as may be necessary for discovery and arrest of the offender and then the whole machinery which has been laid down in Chap. V, Bombay City Police Act is set in motion. The investigation which the police-officer has started on his having reason to suspect the commission of the offence has to be carried on to its final conclusion. If in spite of the various remand applications made and the remands granted by the learned Magistrate the police officer does not find evidence sufficient to charge-sheet the accused, he may under S. 73, Bombay City Police Act release him on his executing a bond with or without sureties, as such officer may direct, to appear if and when so required before a Magistrate empowered to take cognizance of the offence and forward the report prepared by him to the Commissioner of Police together with any weapon or other article which it may be necessary to produce before him. In this case, it appears that the police-officer could have discharged the plaintiff but for the fact that

the bail bond which had been given by the accused before that date had got to be cancelled.

[9] This being the position, I agree with the decision of Mukerji J. in *Nagendra Nath Ray's case* : (57 Cal. 25 : A. I. R. (17) 1930 Cal. 392) and have come to the conclusion that the defendants did not prosecute the plaintiff. The defendants did nothing more than merely lay the information before the police and it was the police, that after being satisfied that there was reason to suspect the commission of the offence, proceeded to investigate the facts and circumstances of the case, took the necessary orders for remand which in law they were bound to do and ultimately discharged the plaintiff, there being no sufficient evidence implicating him in the commission of the offence in spite of their best endeavours to see if there was any evidence forthcoming in that behalf.

[10] I, therefore, answer issue No. 2 in the negative. The circumstance, that the plaintiff was prosecuted by the defendants is an essential *sine qua non* of an action for malicious prosecution. Having regard to the conclusion which I have come to that the plaintiff was not prosecuted by the defendants, I consider it futile for me to go into the other questions which are the subject-matter of issues Nos. 3 and 4 before me, and I, therefore, decline to go into the same. This finding of mine on this preliminary issue is sufficient to dispose of the case, and I accordingly dismiss the suit with costs.

R.G.D.

Suit dismissed.

A. I. R. (36) 1949 Bombay 104 [C. N. 33.]

CHAGLA C. J. AND BHAGWATI J.

Madhavprasad Kalkaprasad Nigam — Plaintiff—Appellant v. S. G. Chandavarkar — Defendant—Respondent.

O. C. J. Appeal No. 15 of 1948, Decided on 24th August 1948.

(a) Presidency Small Cause Courts Act (XV [15] of 1882), Chap. 7, S. 48 — Order obtained in proceeding under Chap. 7, against person for delivery of possession—Order is not decree within meaning of S. 2 (2), Civil P. C.—Suit for declaration of present right to possession by person against whom such order is passed—Art. 11A, Limitation Act does not apply—Article applies only where order for possession is given by decree — Civil P. C. (1908), S. 2 (2), O. 21, R. 103—Limitation Act (1908), Art. 11A.

Proceedings taken by a landlord in Small Cause Court under Chap. 7, Presidency Small Cause Courts Act in order to eject his tenant are not a suit and the order of ejectment obtained in such proceedings from the Small Cause Court is not a decree. Such an order is not a final adjudication. A. I. R. (16) 1929 Mad. 69; 31 Bom. 259 ; A.I.R. (8) 1921 Bom. 180 and A. I. R. (14) 1927 Bom. 556, *Rel. on.* [Paras 2 and 3]

Article 11A, Limitation Act does not therefore apply to a suit for title under O. 21, R. 103, Civil P. C. read with S. 48, Presidency Small Cause Courts Act by per-

son against whom an order for giving up possession is made under Chap. 7, Presidency Small Cause Courts Act. The article applies when such an order is made by a decree. While the provisions of the Civil P. C. are made applicable by S. 48, Presidency Small Cause Courts Act, it cannot be said that Art. 11A has also been made applicable to a case of a person obtaining order from the Small Cause Court. It is an elementary principle of construction that the scope of the Limitation Act cannot be extended by implication, and a party's right to come to Court cannot be taken away unless the Limitation Act expressly provides that his right is so barred. [Para 4]

If Art. 11A does not apply, then the suit being one for declaration, either Art. 120 or Art. 144 would apply. A. I. R. (16) 1929 Mad. 69, *Rel. on.* [Para 4]

Annotation: ('44-Com.) Civil P. C., S. 2 (2) N. 5; O. 21, R. 103 N. 1 and 5; ('42-Com.) Limitation Act, Art. 11A N. 8.

(b) Civil P. C. (1908), S. 96 —New plea—Point of limitation, being point of law, can be raised for first time in appeal — But the fact that it is so raised would be relevant in considering the question of costs — Civil P. C. (1908), S. 35 (*Bhagwati J.*)

[Para 8]

Annotation: ('44-Com.) Civil P. C., S. 35 N 7 Pt. 31; O. 41 R. 2 N. 4 and 5.

Purshottam Tricumdas and S. A. Desai—

for Appellant.

*M. P. Laud and K. K. Desai—*for Respondent.

Chagla C. J.—This appeal raises a very short point of limitation. On 4th May 1945, an order was passed by the Small Cause Court in proceedings instituted by the defendant against A. A. Patil and this was an order for ejectment against Patil. Time was given to Patil to vacate by 14th May 1945, and a warrant of possession was issued on 18th May 1945 and when the defendant attempted to execute the warrant of possession, he was obstructed by the plaintiff. On 22nd May 1945, the defendant took out an obstructionists notice, and on 10th December 1945, the notice was made absolute in favour of the defendant. From that order, the plaintiff came to this Court in revision, and this Court dismissed the revisional application on 17th February 1947. The plaintiff then filed this suit on 29th March 1947, for a declaration that he was the tenant of the defendant and that as such tenant he was entitled to remain in possession of the shop. He also sought for a declaration that the defendant was not entitled to execute the warrant of possession which he had obtained from the Small Cause Court. Tendolkar J. before whom the suit came, tried the preliminary issue with regard to limitation, and as he came to the conclusion that the plaintiff's suit was barred, he dismissed the plaintiff's suit. The plaintiff has come to us in appeal from that decision.

[2] The view that the learned Judge took was that the order passed by the Small Cause Court on 10th December 1945, was an order under O. 21, R. 103, Civil P. C., and the suit was barred under Art. 11A, Limitation Act, because it was not filed within a year of the passing of that order.

Now, with very great respect to the learned Judge, the whole of his judgment proceeds on the assumption that the proceedings instituted by the defendant in the Small Cause Court were a suit and the order that he obtained on 4th May 1945, was a decree. As we shall presently point out, this assumption, which underlies the judgment, is fallacious and, therefore, the conclusion to which the learned Judge arrived at is not correct. The Small Cause Court has no jurisdiction to try suits affecting immovable property, but under Chap. 7, Presidency Small Cause Courts Act, the Small Cause Court has been given a special jurisdiction to pass orders for ejectment. Under S. 41 when a tenancy has been terminated and when the rent does not exceed Rs. 2,000, a landlord may obtain a summons against his tenant to show cause why possession should not be handed over to him, and under S. 43 the Small Cause Court may make an order in favour of the landlord ordering possession against his tenant. Under S. 48, the Code of Civil Procedure is made applicable to all proceedings under Chap. 7, and under S. 49 it is expressly enacted that the recovery of the possession of any immovable property under Chap. 7 should be no bar to the institution of the suit in the High Court for trying the title thereto. Looking to the scheme of the Small Cause Courts Act and of Chap. 7 it is clear that the proceedings taken by the defendant in order to eject his tenant were not a suit and the order that he obtained from the Small Cause Court for ejectment was not a decree.

[3] Mr. Laud has attempted to argue that as the order of the Small Cause Court was a final adjudication with regard to the party's rights, that adjudication must be looked upon as a decree. We are unable to accept that view. If one turns to the definition of a decree under the Civil Procedure Code, S. 2 (2), decree is defined as the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. Therefore, a party's rights must be determined not in any proceedings but in a suit, before the result of the suit or the determination of the rights can become a decree. Mr. Laud relies upon various statutory provisions where a Court is enabled to pass a decree in certain proceedings. But those are, what one might call, statutory suits and statutory decrees and there is no provision in the Small Cause Courts Act itself which makes the order of ejectment under S. 43 a decree. It is perfectly clear, if one looks to the Civil Procedure Code, that the order passed by the Small Cause Court is not a decree. That is the view taken of the ejectment order by the Madras

High Court in *Hyder Ali v. Amirudin*, A. I. R. (16) 1929 Mad. 69: (115 I. C. 504). That is also the view of our High Court as given expression to in three decisions: *Ramkrishna v. Haji Dawood*, 31 Bom. 259: (9 Bom. L. R. 208); *Framroz Dosabhai v. Dalsukhbhai Fulchand*, 45 Bom. 972: (A. I. R. (8) 1921 Bom. 180) and *Bai Meherbai v. Pherozshaw Sorabji*, 51 Bom. 885: (A. I. R. (14) 1927 Bom. 556). In *Ramkrishna v. Haji Dawood*, 31 Bom. 359: (9 Bom. L. R. 208) the Divisional Bench consisting of Sir Lawrence Jenkins C. J., and Beaman J., took the view that the proceedings in the Small Cause Court did not result in a decree, and in *Framroz Dosabhai v. Dalsukhbhai Fulchand*, 45 Bom. 972: (A. I. R. (8) 1921 Bom. 180) and *Bai Meherbai v. Pherozshaw Sorabji*, 51 Bom. 885: (A. I. R. (14) 1927 Bom. 556), the Divisional Benches also of this Court took the view that the proceedings under Chap. 7 were not suits. If, therefore, the order of ejectment is not a decree, then the question is, which is the article of the Limitation Act which is applicable. The learned Judge took the view that the suit was barred under Art. 11A.

[4] Now, turning to Art. 11A it is clear that that applies to a suit filed by a person against whom an order is made for giving up possession to the holder of a decree. It cannot be said in this case that the plaintiff has filed this suit against the defendant who has obtained possession from him under a decree. Order 21, R. 103 makes it clear that the procedure under Rr. 97 to 103 of that Order are all in the nature of a summary procedure, and R. 103 makes the order passed by the Court on an obstructionists notice conclusive subject to the result of any suit which a person affected by that order may file, and when the proceedings under O. 21 relate to the resistance to delivery of possession to a decreeholder, then undoubtedly under Art. 11A the suit is to be filed within a year from the date of the order. But in this case the resistance to delivery of possession by the plaintiff is not to a decreeholder but to one who has obtained an order of possession passed by the Small Cause Court, and it is only by reason of S. 48 that Rr. 97 to 103, Civil P. C., are made applicable to the obstructionists notice taken out by the defendant against the plaintiff. But while the provisions of the Code are made applicable, it cannot be said that Art. 11A has also been made applicable to the case of a person obtaining an order from the Small Cause Court. It is an elementary principle of construction that the scope of the Limitation Act cannot be extended by implication, and a party's right to come to Court cannot be taken away unless the Limitation Act expressly provides that his right is so barred, and strictly construing Art. 11A, Limitation Act, it is clear

that it is only in the case of proceedings taken under a decree that Art. 11A would apply. If, therefore, Art. 11A does not apply, then this being a suit for a declaration either Art. 120 or Art. 144 would apply, and it is not disputed that in that case the plaintiff's suit would be within time. This view is in accord with the Madras decision to which I have already referred *Hyder Ali v. Amirudin*, A. I. R. (16) 1929 Mad. 69: (115 I. C. 504).

[5] In my opinion, therefore, the learned Judge was wrong in coming to the conclusion that the plaintiff's suit was barred. We would, therefore, allow the appeal, set aside the order of dismissal passed by the learned Judge and remand the suit for disposal according to law.

[6] **Bhagwati J.** — Two questions arise for our determination in this appeal: (1) Whether the suit is a suit under O. 21, R. 103, Civil P. C., and (2) whether Art. 11A, Limitation Act applies to this suit.

[7] The proceedings were initiated under Chap. 7, Presidency Small Cause Courts Act, for recovery of possession of immovable property. They terminated so far as the Small Cause Court was concerned by an order passed in favour of the defendant on 10th December 1945. A civil revision application was filed against that order on 22nd December 1945, which application was dismissed on 17th February 1947. This suit was filed on 29th March 1947, asking for a declaration that the plaintiff was a tenant in respect of the suit premises and as such tenant entitled to remain in possession thereof. So far as proceedings under Chap. 7, Presidency Small Cause Courts Act are concerned, it has been held that they are neither a suit, nor an order passed as a result thereof a decree within the meaning of S. 2 (2), Civil P. C. They are merely proceedings which are initiated in the Small Cause Court by virtue of the provisions of Chap. 7 thereof, and the best that can be said with regard to the same is that the result of these proceedings is an order in favour of the party who obtains the same in his favour. The proceedings are not a suit, the order is not a decree, and it is too late in the day now to contend, in view of the various decisions of our High Court, which are reported in *Ramakrishna v. Haji Dawood*, 31 Bom. 259: (9 Bom. L. R. 208), *Framroz Dosabhai v. Dalsukhbhai Fulchand*, 45 Bom. 972: (A. I. R. (8) 1921 Bom. 180) and *Bai Meherbai v. Pherozshaw Sorabji*, 51 Bom. 885: (A. I. R. (14) 1927 Bom. 556) that these proceedings are a suit and the order made therein is a decree. Section 48, Presidency Small Cause Courts Act provides that in all proceedings under Chap. 7 the Small Cause Court shall, as far as may be and except as therein otherwise provid-

ed, follow the procedure prescribed for a Court of first instance by the Code of Civil Procedure, and it is by virtue of this provision in S. 48 of the Act that the provisions of the Civil Procedure Code contained in O. 21, Rr. 97 to 103, are made applicable to these proceedings. If these provisions contained in O. 21, Rr. 97 to 103, are thus made applicable, it is clear in my opinion that the results which are laid down in R. 103 also do follow, that is, the order made under these proceedings is conclusive, save for any suit which may be filed, within the meaning of R. 103 itself. That is the suit which was filed by the plaintiff in order to have a declaration of his title in his favour, and it is clear, therefore, that this suit was a suit contemplated by and within the provisions of O. 21, R. 103, Civil P. C.

[8] The next point, therefore, to determine is whether Art. 11A, Limitation Act would apply to the suit as filed. Curiously enough, when the matter came to be argued before the learned trial Judge, counsel on behalf of both the parties assumed that Art. 11A applied, as appears from this passage from the judgment of the learned Judge himself :

"There is no dispute that the period of limitation applicable would be, under Art. 11A of the Schedule to the Limitation Act, one year from the date of the order."

The only way in which the plaintiff wanted to get out of the bar of limitation was by arguing that the period which was taken up in the disposal of the civil revision application, which was filed on 22nd December 1945, and was disposed of on 17th February 1947, should be excluded under S. 14, Limitation Act. That contention was negatived by the learned trial Judge following a decision of Patkar J. in *Narayan v. Hari*, 32 Bom. L. R. 1186 : (A. I. R. (17) 1930 Bom. 505). That was the only contention which was urged before the learned trial Judge, and when the matter came to be argued by the appellant before us, the contention which was taken up by the appellant was that Art. 11A, Limitation Act did not apply at all. No doubt, it being a point of law it is open to the appellant to urge the same. The fact, however, remains and it will be relevant when we come to decide the question of the costs that no such contention was raised by the appellant before the learned trial Judge.

[9] Considering, therefore, this aspect of the question, we have got to consider how far the terms of Art. 11A, Limitation Act apply to the suit before us. Article 11A prescribes the period of limitation in respect of a suit by a person against whom an order has been made under the Code of Civil Procedure, 1908, upon an application by the holder of a decree for possession of immovable property, and the period of limitation

prescribed is one year from the date of the order. It is an essential pre-requisite to the application of this Art. 11A that the order must have been made upon an application by the holder of a decree for possession of immovable property. We have got, therefore, to come to the conclusion, before the application of this Art. 11A can be attracted, that the defendant in this case was a holder of a decree for possession of immovable property, but as I have pointed out before, the proceedings which were initiated in the Small Cause Court were neither a suit nor was the order a decree. If that was so, it could not be said that the defendant was the holder of a decree for possession of immovable property, and if he was not such holder of a decree, it could not be urged that the plaintiff was a person against whom an order had been made under the Code of Civil Procedure upon an application by the holder of a decree for possession of immovable property within the meaning of that Article. Mr. Laud urged that the order which was made as a result of the proceedings initiated in the Small Cause Court was executable as a decree, if not a decree in terms of the definition thereof in S. 2 (2), Civil P. C. Even there the argument does not help the appellant at all. The terms of the Limitation Act cannot be extended in this manner. The provisions have got to be strictly construed, and unless the defendant comes within the description of the holder of a decree for possession of immovable property, Art. 11A cannot help the appellant at all. The case which was cited by Mr. Purshottam for the appellant, *Hyder Ali v. Amiruddin*, A. I. R. (16) 1929 Mad. 69 : (115 I. C. 504), is a case on all fours with the present one, and I need not dilate any more on the propositions which have been laid down therein, except to say that we are in perfect accord with the reasoning of that decision. Following the reasoning of that decision it is clear that the present suit is not a suit which is covered by Art. 11A, Limitation Act. If at all it would fall within Art. 120 or Art. 144, as the case may be, in which case the suit which is filed is clearly within time.

[10] For the reasons above stated, therefore, I agree with the order proposed by my Lord the Chief Justice.

[11] **Chagla C. J.** — As Mr. Purshottam has succeeded on a point which was not urged before the trial Court and which does not even find a place in the memo of appeal here, we think the fairest order to make with regard to the costs would be that the costs of the appeal and the costs of the hearing will be costs in the cause.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Bombay 108 [C. N. 34.]

JAHAGIRDAR J.

Bharmagowda Bhimagowda Patil and others—Applicants v. Irappa Satyappa Dhanagar and others—Opponents.

Civil Revn. Appln. No. 432 of 1947, Decided on 27th February 1948, from order of Civil Judge (Junior Division) Hukeri, on Exhibit No. 56 in Proceeding No. 1805 of 1945.

Bombay Agricultural Debtors' Relief Act (XXVIII [28] of 1947), S. 17—Whether particular sale is binding on debtor cannot be decided by Court acting under Act.

A Court acting under the Act cannot decide a point as to whether a particular sale is binding upon the debtors or not: A. I. R. (15) 1928 Bom. 425; A. I. R. (11) 1924 Bom. 417 and A. I. R. (19) 1932 Bom. 23, *Rel. on.* [Para 4].

D. R. Manerikar — for Applicants.

B. M. Kalagate — for Opponents Nos. 1 to 3.

Order.—This is a revision application filed by the applicants who are described as creditors, against the finding given by the Court established under the Bombay Agricultural Debtors' Relief Act that the sale of 1909 passed by the predecessor-in-title of the debtors was not binding upon the reversioners, i. e., the debtors. The facts leading to this application are these.

[2] One Irappa was the owner of the two survey Nos. 43 and 44. He had two sons, Satyappa and Mallappa. Mallappa died leaving a widow Shiddava. Shiddava on 19th August 1895, mortgaged to the predecessors-in-interest of the applicants before me her share in these two survey numbers for Rs. 150. On 29th July 1909, she sold her equity of redemption to the applicants' predecessor-in-title. Shiddava died about the year 1934. On 3rd August 1944, the present opponents as the reversionary heirs of Shiddava filed suit No. 208 of 1944 in the Court of the Civil Judge, Junior Division, at Hukeri, for redemption of the mortgage of 1895. In that plaint they did not even refer to the sale-deed passed by Shiddava in favour of the predecessor-in-interest of the present applicants. The defendants who are the applicants here, contended in the suit that Shiddava had already sold her equity of redemption to them and that the mortgage was not subsisting and that, therefore, the suit under the Dekkhan Agriculturists' Relief Act could not lie. But after the Debt Adjustment Board was established in that taluka, at the instance of debtors, i. e., the opponents, the suit was transferred to the Board on 12th January 1946. On 27th May 1947, the Bombay Agricultural Debtors' Relief Act of 1947 came into force. So, that matter was transferred back to the Court from the Debt Adjustment Board. At the instance of the opponents-debtors a preliminary issue No. 3, was raised, viz., whether the sale by Shiddava dated 29th July 1909, was for legal ne-

cessity and binding on the reversioners. The applicants, who are described as the creditors, contended that as Shiddava had already sold her equity of redemption, the Bombay Agricultural Debtors' Relief Act would not govern this case and the Court established under the Bombay Agricultural Debtors' Relief Act had no jurisdiction to decide that issue. The Court, however, held that it had jurisdiction to decide that issue, and has recorded a finding that the sale by Shiddava not being for legal necessity was not binding upon the reversioners who are the debtors in this case. As against this finding, the applicants have come in revision to this Court.

[3] Mr. Kalagate, the learned advocate for the debtors, raises a preliminary objection that an appeal against the order passed under S. 17 lies to the District Court and, therefore, a revision application to the High Court against an order passed under S. 17 is not competent. Section 17 provides:

"On the date fixed for the hearing of an application made under S. 4, the Court shall decide the following points as preliminary issues:

(a) whether the person for the adjustment of whose debts the application has been made is a debtor;

(b) whether the total amount of debts due from such person on the date of the application exceeds Rs. 15,000."

Now, these two preliminary issues had been raised in the present case and it is the contention of Mr. Kalagate that unless the Court decided that the sale of 1909 was not binding upon the reversioners, it was not open to the Court to record a finding on these preliminary issues and, therefore, as a necessary prerequisite condition for recording a finding on those two preliminary issues, the Court had to decide this third preliminary issue, as to whether the sale was binding upon the reversioners. Therefore, it must be construed that issue No. 3 would also fall within the purview of S. 17. It is, however, contended by Mr. Manerikar, the learned advocate for the creditors, that it is not within the scope of authority of the Court established under the Bombay Agricultural Debtors' Relief Act to decide as to whether a particular sale is binding on the debtors or not, because according to him the scope of the Act is as follows. First of all, an application has got to be made under S. 4 either by the debtor or by the creditor for adjustment of the debts. Now, this duty presupposes that the suit or the dispute must be about the existing debts. If, on the face of it, it is clear that the dispute is about the existing debts, S. 17 will immediately come into play, and the Court has got to decide the preliminary issue as to whether the person is a debtor and whether his debts do not exceed Rs. 15,000. But if on the face of the contentions it is not clear as to

whether there was any debt, then S. 24 provides that in the course of the hearing of an application made under S. 4 if any contention is raised that a particular transaction which appears to be a sale was a mortgage, it is open to the Court to hold that it was a mortgage before it decides under S. 17 about the existence and the extent of the debt. But no such power is conferred on the Court to decide whether a particular alienation is binding on the debtors if in the course of an inquiry under S. 4 where, on the pleadings, it is not clear as to whether there was any debt, there is a contention that a particular alienation is not binding on the debtors. The determination of this issue is outside the scope of the Bombay Agricultural Debtors' Relief Act.

[4] I think this contention is well founded. Even under the Dekkhan Agriculturists' Relief Act such a suit is not competent. Originally, the suit No. 208 of 1944 was filed in the Hukeri Court for redemption under the Dekkhan Agriculturists' Relief Act or in the alternative under the Transfer of Property Act. There are rulings to show that if in answer to such a suit, the defendant showed that the mortgage is not in existence and the right of redemption has also been sold, then such a suit would not be competent under the Dekkhan Agriculturists' Relief Act. In *Chandikaprasad v. Shivappa*, 30 Bom. L. R. 1099 : (A. I. R. (15) 1928 Bom. 425) it has been held that where a sale deed is passed by the defendant as a manager of the Hindu joint family of which the plaintiffs were members, it could not be absolutely ignored by the plaintiffs and it was not competent to them to resort to the special provisions of the Dekkhan Agriculturists' Relief Act. There are other cases also on this point, viz., *Krishnaji v. Sadanand*, 26 Bom. L. R. 341 : (A. I. R. (11) 1924 Bom. 417 and *Shidlingava v. Rajava*, 33 Bom. L. R. 603 : (A. I. R. (19) 1932 Bom. 23), wherein it has been laid down that a suit could not lie under S. 15B, Dekkhan Agriculturists' Relief Act since it involves an issue whether or not the mortgage was in existence. It, therefore, appears clear to me that such suits were not even competent under the Dekkhan Agriculturists' Relief Act, and, in the absence of any express provision conferring the power to decide such issues upon the Court established under the Bombay Agricultural Debtors' Relief Act, I must hold that the Court acting under the Bombay Agricultural Debtors' Relief Act cannot decide the point as to whether a particular sale is binding upon the debtors or not. If that is so, then the Court had no jurisdiction to frame such an issue and record a finding on it, and it is also clear that unless this issue was found upon in favour of the debtors, the preliminary issues under S. 17 could

not be found upon. Therefore, it is no use merely setting aside the finding recorded by the trial Court. I must follow it up by a direction that the proceedings be transferred from the Court established under the Bombay Agricultural Debtors' Relief Act to the regular Court for disposal on merits.

[5] The rule is made absolute and the opponents should pay the costs of the applicants.

R.G.D.

Rule made absolute.

A. I. R. (36) 1949 Bombay 109 [C. N. 35.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Y. R. Parpia — Appellant v. R. M. D. Chamarbagwalla — Respondent.

O. C. J. Appeal No. 40 and Misc. No. 91 of 1948, Decided on 28th July 1948.

(a) Bombay Prize Competition Tax Act (XI [11] of 1939), S. 4 — License for prize competition — Collector has discretion to refuse license — Principle as to construction of powers stated — Interpretation of statutes.

When the Court is deciding whether a particular power with which an authority is vested is a power coupled with duty or merely a discretionary power, it must look at the whole scheme of the Statute, and if it comes to the conclusion that it is not possible to reconcile all the sections of the Statute, then it should not interpret the power as a power coupled with duty, but must give to the expression its ordinary plain meaning and construe it merely as a power to be exercised at the discretion of the authority. [Para 5]

Section 4 does not provide for the issue of any license in respect of prize competition by the Collector, but it cannot be disputed that there is implied and assumed in the section a power on the part of the Collector to issue a license. [Para 2]

Under S. 4, the implied power to grant a license also carries with it the implied power to refuse to grant the license for conducting a prize competition. It is not a power coupled with a duty or an obligation to exercise that power in favour of the petitioner if he complies with the conditions laid down in the statute. [Para 5]

(b) Bombay Prize Competition Tax Act (XI [11] of 1939), S. 4 — Discretion of Collector — Discretion must be of Collector himself — Discretion should not be arbitrary.

The discretion that has got to be exercised under S. 4 is the discretion of the Collector himself. Further the discretion to be exercised must be proper discretion, a discretion free from any caprice or arbitrariness. [Para 11]

Mere consideration by the Collector of the general policy of Government with regard to the issuing of licenses would not amount to his discretion being fettered. Something much more than that has to be established. [Para 14]

(c) Bombay Prize Competition Tax Act (XI [11] of 1939), S. 10 (4) — "In the public interest" — Expression is not *eiusdem generis* with contents of sub-cl. (1), (2) and (3).

The expression "in the public interest" used in sub-cl. (4) is not *eiusdem generis* with what is contained in sub-cl. (1), (2) and (3). In other words, the public interest contemplated in sub-cl. (4) is not one which is confined to the question of collection of tax. It is something which is infinitely wider than fiscal considerations which might move and influence the State. It is,

therefore, open to the Collector to suspend or cancel a license under sub-cl. (4) for a reason which is other than a fiscal reason and a reason which in the opinion of the Provincial Government constitutes a reason of public interest. [Para 4]

(d) Bombay High Court Rules (Original Side), R. 180—Affidavits by high Government Officers—Cross-examination of officers—Ordinarily, statements in affidavits should be accepted—Civil P. C. (1908), O. 19, R. 2 and Evidence Act (1872), S. 114.

It is in very rare cases that the Court would not accept a statement in an affidavit of a highly placed and responsible Government Officer who has made a solemn affirmation, and would compel him to submit himself to cross-examination. [Para 12]

The Collector, in the exercise of the power under S. 4, Bombay Prize Competition Tax Act, 1939, refused a license to the petitioner to conduct a prize competition. In answer to the allegation of the petitioner that the Collector had not exercised his discretion at all but that the discretion had been exercised by the Government of Bombay, the Collector made an affidavit stating: "I say that Government decided it and laid down its general policy and confidentially circulated it for the guidance of its officers. I say that I have considered this matter separately on its merits and have refused to grant the license asked for in the honest exercise of my discretion." On an application by the petitioner for an order under R. 180, Bombay High Court Rules (Original Side) (corresponding to O. 19, R. 2, Civil P. C.)

Held that an order under R. 180 for the attendance for cross-examination of the Collector should be made. [Para 14]

Annotation: ('44-Com.) Civil P. C., O. 19, R. 2, N. 1; ('46-Man.) Evidence Act, S. 114, N. 28.

(e) Evidence Act (1872), S. 114, Illus. (e)—Official acts—Discretion vested in Government Officers—Exercise of—Presumption arises that it is done in their official capacity.

When Government Officers exercise a discretion vested in them they do so in their official capacity and there is a presumption under S. 114 that official acts are regularly performed. [Para 12]

Annotation: ('46-Man.) Evidence Act, S. 114, N. 29.

M. P. Amin, Acting Advocate-General and M. M. Jhaveri—for Appellant.

R. J. Kolah, M. J. Mistree and N. K. Gamadia—for Respondent.

Chagla C. J.—The petitioner in this case is the sole concessionaire for India, Burma and Ceylon of Messrs. Littlewood's Pool Ltd., Liverpool, who are conducting on a large scale a Football Pool Competition. In July 1946, the petitioner applied for and obtained a license from the Collector of Bombay for a period ending 31st March 1947. He further applied and obtained a license for a further period ending 31st March 1948. On the expiration of that period, he made an application for a renewal of his license, and the Collector of Bombay refused to renew the license. On that he presented a petition for a mandamus under S. 45, Specific Relief Act, to compel the Collector to issue the license to him. The matter came up before Bhagwati J. and he made an order on the Collector to issue the license to him. From the order of Bhagwati J. the Collector of Bombay has come in appeal before us.

[2] The license which the petitioner seeks is issued under the Bombay Prize Competition Tax Act, 1939, and S. 4 of that Act provides that no prize competition shall be conducted unless a license in respect of such competition has been obtained by the promoter thereof from the Collector. This section does not provide for the issue of any license by the Collector, but it cannot be and it is not disputed that there is implied and assumed in the section a power on the part of the Collector to issue a license. The question that arises for determination is whether this power is discretionary or whether it is a power coupled with a duty and the Collector is bound to exercise the power in favour of the petitioner if he complies with the conditions laid down in the Statute. Now, the principles which have to be considered in determining this question have been by now very well settled and I had occasion to attempt to formulate them, after considering various English decisions, in the case of *Chief Controlling Revenue Authority v. Maharashtra Sugar Mills*, 49 Bom. L. R. 893 : (A. I. R. (35) 1948 Bom. 254). Those principles clearly show that not much help or guidance can be obtained for determining this question from the language and the terms of the section itself. On the face of the language used in the section, it could not be said that there is any obligation upon the Collector to issue a license in favour of the petitioner. But that question has got to be decided *aliunde* by considering the object, the scope and the scheme of the Act. If it is found in considering these factors that there is a right created in favour of the applicant, then the law will assume a corresponding duty on the part of the respondent. Therefore, what we have to determine is, after looking at the scheme of the Act, whether there was any right in the petitioner to obtain a license from the Collector. If we find that there was such a right, then the power with which the Collector is entrusted under S. 4 is a power which he must exercise in favour of the donee of such a right.

[3] Therefore, let us look at the object, scope and the scheme of the Act. The preamble of the Act states that it is for the purpose of regulating and levying of tax on prize competitions in the province of Bombay, and judging merely by this preamble it would be possible to contend, as it has been contended by Mr. Kolah very strenuously, that this piece of legislation is a purely fiscal legislation. Section 2 contains definitions, and the prize competition with which we are concerned in this case is a prize competition which falls under S. 2, sub-cl. (2) (b). Section 3 is a charging section. It provides for a levy of tax on prize competitions at the rate of 12½ per cent. and sub-cl. (6) gives power to the Provin-

cial Government to vary the rate to be levied so long as it does not exceed 25 per cent. Then comes S. 4 to which we have already referred and which provides for the issuing of a license. Mr. Kolah's contention is that a license is only to be issued under S. 4 for the purpose of facilitating the collection of revenue. It has no other purpose except this, and once the conditions laid down under the Act with regard to various formalities to be observed by the person who applies for the license are complied with, then the license must be granted as a matter of right. We shall deal with this contention a little more in detail when we come to consider the other sections of the Statute. Section 5 deals with expiry and renewal of the license. It is under this section that the petitioner has applied for a renewal of the license from the Collector. Section 5 (1) provides that every license shall be in such form and subject to such conditions as may be prescribed and shall expire on the last day of the year for which it was granted and may be renewed from year to year; and sub-cl. (2) of S. 5 provides: "The Collector may impose for the grant or renewal of every such license such fee not exceeding Rs. 10 as may be prescribed." Section 6 is a penal section which is consequential upon S. 4. Section 7 provides for promoters keeping and maintaining accounts, and S. 8 is a penal section following upon S. 7. Section 9 gives the power to the Collector to inspect accounts maintained by the promoter. Section 10 is a very important section which gives the power to the Collector to suspend or cancel a license for reasons stated in that section. Now these reasons are set out in four sub-clauses: (1) deals with the case of the tax mentioned in S. 3 not being paid; (2) deals with a breach of any of the conditions subject to which the license is granted and (3) deals with the contravening by the licensee of the provisions of S. 7. Then comes sub-cl. (4) which is in these terms: "for any other reason for which the suspension or cancellation of the license is, in the opinion of the Provincial Government, necessary in the public interest."

[4] Now Mr. Kolah's contention is that sub-cl. (4) is *ejusdem generis* with what is contained in sub-cl. (1), (2) and (3), or, in other words, according to Mr. Kolah, that the public interest contemplated in sub-cl. (4) is a public interest which is confined to the question of collection of tax. Therefore, according to Mr. Kolah, all the four grounds mentioned in S. 10 are of a fiscal character. We are unable to accept that contention. With very great respect to the learned Judge who also took the same view that sub-cl. (4) was *ejusdem generis* with sub-cl. (1), (2) and (3), on the face of this clause and the manner in which it has been drafted, it is impossible to

hold that, "in the public interest" is *ejusdem generis* with what is contained in sub-cl. (1), (2) and (3). If the intention of the Legislature was that sub-cl. (4) should deal with the same genus as is dealt with in sub-cl. (1), (2) and (3), then sub-cl. (4) would have stopped at the expression "necessary". But the Legislature has gone on to provide and mentioned a new genus and indicated a different head which is "public interest" and it is impossible to contend that public interest is not something which is infinitely wider than fiscal considerations which might move and influence the State. It may be—and very often is—that collection of revenue from a certain source may be contrary to the interest of the State. Therefore, according to Mr. Kolah, although it may be under certain circumstances contrary to the interest of the State, to allow certain kinds of prize competitions to go on in Bombay, still it would not be open to the Provincial Government or the Collector under S. 10 to cancel the license for that reason, because that would not be a fiscal consideration and far from helping the collection of tax it would prevent the collection of tax. Once we come to the conclusion that it is open to the Collector to suspend or cancel a license for a reason which is other than a fiscal reason and a reason which in the opinion of the Provincial Government constitutes a reason of public interest, then that interpretation has a very great bearing both on S. 4 and on the question of whether the petitioner has or has not a right to the obtaining of a license, if he complies with the other conditions set out in the Act. If a license could be suspended or cancelled for public interest, then it is not possible for the petitioner to say that he has a right to carry on his business of prize competition subject merely to the formal granting of license. Higher and wider considerations would then come into play. It would be then for Government to say whether under particular circumstances a particular prize competition business should or should not be allowed to go on, and if such a right is not vested in the petitioner, then in interpreting S. 4 we cannot say that a duty or an obligation is cast upon the Collector to grant a license to the petitioner. It is also difficult to see why, if the Collector can suspend or cancel a license for a particular reason mentioned in S. 10, that consideration cannot also move him in either refusing a license in the very first instance under S. 4 or refusing the renewal of a license under S. 5.

[5] Mr. Kolah has argued that whereas the Legislature has specifically provided for sub-cl. (4) in S. 10, no such limitation is placed either in S. 4 or S. 5 of the Act. Now, that has been done for a very good reason. When a license

has been issued a vested right has been created, and in order to take away that vested right or interfere with that vested right there must be a specific statutory provision and that statutory provision is contained in S. 10. On the other hand, if the issuing of a license or the renewal of a license was discretionary with the Collector under Ss. 4 and 5, no such considerations need be specifically stated, and the Legislature need not point out how and under what circumstances he should exercise his discretion. Look at the other absurdity of the situation, if we accept the contention of Mr. Kolah. According to him there is an indefeasible right in his client to obtain a license as soon as he applies for its renewal and complies with the conditions laid down in the Act. Yet under S. 10, on the very next day, it would be open to the Collector to suspend or cancel the license, if in the opinion of the Provincial Government such a cancellation or suspension became necessary in the public interest. And also according to Mr. Kolah (and he is driven to that conclusion, he says), it may be that after the Collector has suspended or cancelled the license, if the licensee were to apply again under S. 4 or S. 5 there would again arise an obligation on the part of the Collector to issue a license. Mr. Kolah says there is possibly a lacuna in the Statute, but we must not read and construe Acts in a manner which leave such anomalous and illogical lacuna to be filled up. Therefore, the authorities clearly lay down that when you are deciding whether a particular power with which an authority is vested is a power coupled with duty or merely a discretionary power, you must look at the whole scheme of the Statute, and if you come to the conclusion that it is not possible to reconcile all the sections of the Statute, if you interpret the power as a power coupled with duty, then you should not do so and give to the expression its ordinary plain meaning and construe it merely as a power to be exercised at the discretion of the authority. Therefore, under S. 4, in our opinion, the implied power to grant a license also carries with it the implied power to refuse to grant the licence.

[6] The same view of the law was taken by Kania J., in the case of *Fakir Mahomed v. Municipal Commissioner of Bombay*, 39 Bom. L. R. 536 : (A. I. R. (24) 1937 Bom. 395) which, according to us, on the facts is very analogous. That learned Judge in that case was considering S. 411, City of Bombay Municipal Act, and under that section no person could carry on in the City of Bombay the trade of a butcher without a license granted by the Commissioner, and Kania J. held that that section entitled the Commissioner either to grant or refuse a license for

carrying on the business of a butcher. There also the contention was, as it has been before us, that there was a duty cast upon the Commissioner to issue a license, if the conditions laid down in the Act or the Rules had been satisfied. Kania J. took the view that S. 411 deprived every citizen, living within the city or to whom the Act applied, of the power to carry on the business of a butcher. The only exception to that was the grant of a license by the Commissioner and carrying on the trade of a butcher in conformity with the terms of that license. Therefore, in effect, Kania J. rejected the contention, which has also been pressed upon us, that there is any such thing as a general right or a common law right to carry on this particular business of prize competition. Once the Act is passed the only right that a citizen has is to carry on that business provided a license is granted to him. Kania J. also held that the power to refuse the license must also be vested in the Commissioner under S. 411, because the power to grant necessarily implied a right to refuse.

[7] The cases of *Rossi v. Edinburgh Corporation*, 1905 A. C. 21 : (91 L. T. 668) and *Gell v. Taja Noora*, 27 Bom. 307 : (5 Bom. L. R. 133) were relied upon by the petitioner before that learned Judge and that case has also been cited at the Bar before us. In that case the House of Lords was considering the conditions of certain licenses which were issued by the Magistrates under the Edinburgh Corporation Act, and under the relevant section power was given to the Magistrates to regulate the selling of ice-cream during certain hours. The Magistrates purported to determine by the terms of the license all that might be desirable or expedient to be done with reference to the times and the circumstances under which ice-cream should be sold, and the House of Lords held that in trying to do so they had travelled far outside the ambit of the Statute which gave them the power to issue the license. This case is relied upon by Mr. Kolah in order to support his contention that inasmuch as the Bombay Prize Competition Tax Act, 1939, is a fiscal Act for the purpose of regulating the tax to be levied on these competitions, it would not be open to the Collector by exercising his discretion to refuse licences to put an end to the business of those competitions. Mr. Kolah says that just as in the case of *Rossi*, (1905 A. C. 21 : 91 L. T. 668) what the Magistrates were purporting to do was travelling outside the ambit of the Act, the Collector is doing the same. In our opinion, that *Rossi's case*, (1905 A. C. 21 : 91 L. T. 668) has really no bearing on the point that we have to consider hear. In the first place, refusing a license to the petitioner does not necessarily mean a complete ban on or prohibition of trade of

prize competitions in Bombay, and there is no suggestion here that a licence is being refused pursuant to any such idea, and, in any case, the ambit of the Act we are considering is much wider and its scope much greater than the narrow limited powers that were sought to be given to the Magistrates under the Edinburgh Corporation Act.

[8] The case very strongly relied upon by Mr. Kolah is a judgment of Blackwell J., in *Ratanshaw Nusserwanji v. McElhinny*, 43 Bom. L. R. 896 : (A. I. R. (29) 1942 Bom. 1). In that case an application was made for a licence for tapping toddy under the Bombay Toddy Tapping Rules framed under the Bombay Abkari Act. The Collector refused to grant the licence on the ground that the policy of Government was declared to be in favour of general prohibition, and Blackwell J. held that the Collector was under an obligation to issue a licence to the petitioner. In coming to this conclusion Blackwell J. considered the scheme of the Bombay Abkari Act and also the rules framed thereunder. The learned Judge refers to S. 14 of the Act which provides that no toddy-producing trees shall be tapped except under the authority and subject to the conditions of the licence granted in that behalf by the Collector. Then he went on to consider the Bombay Toddy Tapping Rules, 1928, and Rr. 9 to 12 provide for various formalities that have to be gone through after an application for a licence was made, and what has got to be done by the Excise Inspector and the Superintendent and the other Government Officers is described in mandatory language in these rules, and as it is obvious from the judgment of the learned Judge, what weighed with him considerably was the imperative nature of the terms used in these rules. The learned Judge says (p. 907) :

"Having regard to the use of the word 'shall' in these rules, which are to have the same force as if enacted in the Act, I am of opinion that no question of the exercise of any discretion by the Collector in the granting of a licence arises, provided that the requirements of the rules are complied with, but that a statutory duty to issue a licence is imposed by S. 14 (1) of the Act, which I shall proceed to consider, read in conjunction with the rules."

[9] It is needless to say that in the case before us, although rules are framed under the Act, there is no such language used as was used in the rules, Blackwell J. was considering. Mr. Kolah has drawn our attention to the fact that even in the Abkari Act there was a provision with regard to suspension and cancellation of licences. Section 32, in the first instance, mentions specific grounds on which a license could be cancelled. Then S. 32A provides that whenever the authority granting a licence considers that it should

be cancelled for any cause other than specified in S. 32, he may cancel the licence. It may be that the power of cancellation conferred under S. 32A is very wide and that may lead to the inference that there was no right in the applicant to obtain an abkari licence provided he satisfied the conditions laid down in the Act, and that the rules framed under that Act were merely procedural and cast no obligation on the authority to issue a licence. But, in our opinion, Blackwell J.'s decision rests solely on the view that he took of the particular rules framed under the Abkari Act, and it is unnecessary to consider whether that decision is a correct decision from the larger point of view which we are considering on the facts of this case.

[10] The next case relied upon by Mr. Kolah is a decision of the Privy Council in *Municipal Corporation of City of Toronto v. Virgo*, (1896) A. C. 88 : (65 L. J. P. C. 4), and the decision is relied upon for the proposition that when a statute deals with the regulation of a business, it is not competent to make rules or issue orders under that statute which would have the effect of completely destroying that business. The actual case the Privy Council was considering was that of a statutory power being conferred on a Municipal Council to make by-laws for regulating the business of hawkers, and the Municipality passed a by-law prohibiting hawkers from plying their trade in an important part of the Municipality, and the Privy Council took the view that the Municipality had not the power to pass such a by-law. It is to be noted that even in coming to this conclusion the Privy Council was careful to point out that in this particular case no question of any apprehended nuisance from the hawkers arose.

[11] The next question that has got to be considered is whether in the exercise of the power of granting or refusing a licence conferred upon the Collector under S. 4, Bombay Prize Competition Tax Act, the Collector has exercised his discretion in refusing to grant a licence to the petitioner. Now, there can be no doubt that the discretion that has got to be exercised is a discretion of the Collector himself. He is the person nominated by the Legislature for this purpose. It is also clear that the discretion to be exercised must be a proper discretion, a discretion free from any caprice or arbitrariness. The allegation of the petitioner in this case is that the Collector has not exercised his discretion at all, but the discretion has been exercised by the Government of Bombay who directs and orders the Collector of Bombay to whom licences should be granted, cancelled, suspended or renewed, and that, in short, there has been a usurpation by the executive of the exercise of the

statutory powers vested under the Act in the Collector. In answer to this averment in the petition the Collector made an affidavit and in para 12 of that affidavit this is what he stated :

"I say that Government decided it and laid down its general policy and confidentially circulated it for the guidance of its officers. I say that I have considered this matter separately on its merits and have refused to grant the licence asked for in the honest exercise of my discretion."

An affidavit in rejoinder was made by the petitioner and he has taken the same stand in this affidavit as he did originally in his petition and has repeated the statement that the Collector acted under instructions and orders of the Government of Bombay and did not exercise any discretion whatsoever. The petitioner also denied that the respondent had considered the matter separately on its merits or had refused to grant the licence asked for in the honest exercise of his discretion. After the Collector had filed his affidavit, the petitioner called upon him to submit himself to cross-examination on the averments made by him in his affidavit. The Collector did not choose to do so, and the learned Judge took the view that inasmuch as the Collector had not stepped into the witness-box, he was entitled to draw the strongest presumption against him, and, therefore, he disregarded the statement made by the Collector in his affidavit that he had exercised his discretion, and came to the conclusion that there was no evidence before him that there was any exercise of discretion by the Collector, and, therefore, according to him the petitioner was entitled to succeed on that aspect of the case as well. Now, with respect to the learned Judge, he has fallen into error in the view that he has taken as to the legal effect of the Collector not responding to the request of the petitioner for stepping into the witness-box. Petitions under s. 45, Specific Relief Act are ordinarily disposed of on affidavits. An affidavit is only one mode of giving evidence. The ordinary mode is for a person to step into the witness-box and submit himself to be cross-examined by the other side. But for convenience and to avoid expense and delay, the law permits this alternative method of giving evidence, but the law has also provided a safeguard and that safeguard is contained in O. 19, R. 2, Civil P. C., 1908, and R. 180, Original Side Rules which corresponds to that provision of the law, and that provision is that it is open to the Court on the application of either party to order the attendance for cross-examination of the person making any such affidavit.

[12] Now in this case all that the petitioner did was, as we have pointed out, to give notice to the Collector to submit himself to cross-examination. The petitioner did not apply to the

learned Judge for an order in terms of R. 180 and no such order was passed. There was no obligation whatever upon the Collector to comply with the requisition contained in the petitioner's notice and to present himself for cross-examination. Therefore, in our opinion, the learned Judge, with respect to him, was not justified in drawing any presumption against the Collector for not having stepped into the witness-box. Mr. Kolah, realising the difficulty, has applied to us that we should make an order under R. 180 so that he should be in a position to test the statements made by the Collector by cross-examination. The Advocate-General has strenuously resisted this application. His contention is that on the affidavit of the Collector it is clear that he has exercised his discretion in refusing to grant the licence to the petitioner. The Advocate-General has also drawn our attention to the fact that it is not usual in cases like this to compel an officer of Government of the standing of the Collector to submit himself to cross-examination. Ordinarily the statements made by him in the affidavit should be accepted. We agree with the Advocate-General that it must be in very rare cases indeed that the Court would not accept a statement of a highly placed and responsible Government officer who has made a solemn affirmation and in coming to the conclusion that we do, we do not want it to be understood that as a normal practice or procedure Courts should make orders under R. 180 against Government officers. When Government officers exercise a discretion vested in them they do so in their official capacity and there is a presumption under s. 114 that official acts are regularly performed. But after all, the question whether an order like this should be made or not is not a question of principle but a question of discretion and the Court must decide on the facts of each case whether the discretion vested in it under R. 180 should or should not be exercised. If the Collector had contented himself by saying that he had considered the merits of the case and that he had exercised his discretion and had refused to grant the licence, we would not have thought it proper to make an order under R. 180. But unfortunately the Collector does not content himself with saying that. He also says that in coming to the conclusion that he did he took into consideration the general policy of Government which is contained in a confidential circular and which is issued for the guidance of the Government officers.

[13] Now, the whole question which arises is whether the discretion exercised by the Collector was his own discretion or was it a discretion that was fettered by anything that Government has done or said. In our opinion, it would not

be wrong or improper for the Collector in exercising his discretion to give full weight to the general policy of Government, provided that policy is within the ambit of the Act. If the Government takes a particular view with regard to prize competitions in the public interest and the Government enunciates that policy, the Collector would be perfectly justified and entitled to consider that policy. But consideration of policy is one thing; to be dictated to or to be ordered to do something is entirely a different thing. If, for instance, Government were to issue instructions that all Collectors in the province should refuse to issue licences to a particular class of people for particular reasons, then it would be impossible to say that the Collectors acting upon those orders would be exercising a discretion which would be free and unfettered. We must not forget that after all the Collector of Bombay is a servant of the Government of Bombay, and it is a matter for investigation to what extent his mind was dominated by this particular circular which the Government issued. Whether the domination was such as to make his discretion fettered is a matter which can only be decided after more materials are before the Court. The Advocate-General has told us that Government claims privilege for the confidential circular which it has issued. We express no opinion whatever as to whether the privilege claimed by Government is rightly claimed in law.

[14] We would, therefore, make an order under R. 180 for the attendance for cross-examination of the Collector, and for that purpose we will send the matter back to Bhagwati J. We wish to make it clear as to what the compass and scope of the Collector's cross-examination should be. The only question which we want the learned Judge to decide after his cross-examination is over is whether the discretion exercised by the Collector was an unfettered discretion or whether it was fettered by any order issued by Government in respect of licenses to be issued by him. The cross-examination will be confined to the averments contained in the affidavit of the Collector in para. 12 and of the petitioner in para. 13 of his petition and the statement contained in para. 3 of his affidavit in rejoinder to which we have already drawn attention, viz., the respondent acted under instructions and orders of the Government of Bombay. The learned Judge will also consider the question whether the confidential circular is a privileged document or not. We wish to repeat again that the mere consideration by the Collector of the general policy of Government with regard to the issuing of licences would not, in our opinion, amount to his discretion being fettered. Some-

thing much more than that would have to be established.

[15] We, therefore, set aside the order made by the learned Judge. With regard to the costs of the appeal, as the record stands, we would certainly have allowed the appeal with costs. It is only an indulgence that we are granting to Mr. Kolah, and what has influenced us in making the order on a very belated application is that we have before us a subject who is fighting for his rights and we should not permit any technicality to come in the way of his attempt at vindication of his rights. But it is at best an indulgence that we are granting. Therefore, it must follow that the petitioner must pay to the respondent the costs of this appeal. With regard to the costs of the petition, as the matter stands, the petition was liable to be dismissed today and the petition survives and gets a new lease of life because of the indulgence we have shown to the petitioner. We think the fair order to make would be that the petitioner should pay half the costs of the respondent. With regard to the other half, they will abide by the ultimate decision of the petition.

V.B.B.

Order set aside.

A. I. R. (36) 1949 Bombay 115 [C. N. 36.]

GAJENDRAGADKAR J.

Narmadabai Narayanshet—Applicant v. Hidayatalli Saheballi — Opponent.

Civil Revn. Appln. No. 579 of 1946, Decided on 19th November 1946, from order of Dist. Judge, Jalgaon, in Appeal No. 233 of 1943.

(a) Civil P. C. (1908), S. 102—Suit includes execution proceedings.

The expression "suit" used in S. 102 includes execution proceedings with the result that if the suit is of the nature described in S. 102, no second appeal would lie from an order made in execution of the decree passed in such a suit unless the value of the suit exceeds Rs. 500. The test in such cases is not the nature of the proceedings in execution, but the nature of the suit in which the decree sought to be executed was passed.

[Para 3]

Annotation : ('44-Com.) Civil P. C., S. 102, N. 4.

(b) Civil P. C. (1908), S. 115 — Conversion of appeal into revision — Second appeal not maintainable was allowed to be converted into revision, in view of the importance of the question of law involved.

[Para 3]

Annotation : ('44-Com.) Civil P. C., S. 115, N. 19.

(c) Limitation Act (1908), Art. 182—"Appeal" in Col. 3, para. 2, includes appeal against order rejecting defendant's application for setting aside *ex parte* decree—Civil P. C. (1908), O. 9, R. 13.

An appeal preferred by a defendant against the order dismissing his application to set aside the *ex parte* decree passed against him falls within sub-para. (2) of Col. 3 of Art. 182, and the limitation for execution of the decree, must be deemed to commence from the date of the final decree or order of the appellate Court, and not from the date of the decree : A.I.R. (19) 1932 P. C. 165, *Applied*; 16 Bom. 123; A. I. R. (14) 1927 Cal. 904;

A. I. R. (4) 1917 Pat. 157, *Held no longer good law in view of* A.I.R. (19) 1932 P. C. 165; 8 Cal. 248; A. I. R. (20) 1933 Bom. 255; A. I. R. (24) 1937 Pat. 337 and A.I.R. (26) 1939 Mad. 157, *Rel. on.* [Para 9]

Annotation : ('42-Com.) Limitation Act, Art. 182, N. 34.

(d) Precedents — Obiter—Privy Council—They are binding. *Case law referred.* [Para 5]

B. N. Gokhale — for Applicant.

P. S. Joshi — for Opponent.

Order. — This appeal has been preferred by the surety against the order passed by the learned District Judge holding that the darkhast filed against the surety is in time and directing the Court of first instance to proceed with the said darkhast and to dispose of it on the merits in accordance with law.

[2] In civil suit No. 475 of 1936, a decree was passed directing defendants 2 and 3 to pay the plaintiff Rs. 307-8-0 and proportionate costs. Pending the suit, certain movables belonging to defendant 3 were attached at the instance of the plaintiff. Thereupon, the said defendant applied to raise the attachment (Miscellaneous Application No. 80 of 1936), and the application was allowed on the defendant furnishing security in that behalf. The present appellant stood surety for the said defendant to the extent of Rs. 400. As a result the movables of defendant 3 which had been attached were returned to him. On the date of the hearing of the suit all the defendants remained absent and an *ex parte* decree was passed in favour of the plaintiff on 18th November 1938. Thereafter, defendant 3, Moharilal, filed Miscellaneous Application No. 157 of 1938 on 29th December 1938, for setting aside the *ex parte* decree and restoring the suit to file. But his application was dismissed on 19th June 1939. Moharilal preferred an appeal against the said order No. 35 of 1939. But even the said appeal failed and was dismissed on 23rd August 1939. The decree-holder has filed the present darkhast Application No. 1171 of 1942 seeking to execute the decree against the surety. When notice was issued to the surety under O. 21, R. 22, he filed his written statement in which the main contention urged by him against the decree-holder's claim was that the darkhast is barred by limitation. He has also contended that he had stood surety not for the purpose of the suit, but for the purpose of Miscellaneous Application No. 80 of 1936, and that the darkhast in which the *ex parte* decree is sought to be executed cannot be enforced against him. The learned Civil Judge, Junior Division, Yawal, rejected the surety's contention that he had stood surety in Application No. 80 of 1936 and was not liable for the decree which was passed in the suit. He, however, held that the darkhast filed by the decree-holder was barred by limitation since it had been filed more than

three years after the date of the decree. Accordingly, the decree-holder's darkhast was dismissed with costs. The appeal preferred by the decree-holder in the District Court of East Khandesh, however, succeeded, the learned District Judge having held that the present darkhast was in time. Accordingly, the learned District Judge has sent back the proceedings to the Court of first instance for disposal according to law. It is against this order that the surety has preferred the present second appeal.

[3] On behalf of the respondent, Mr. P. S. Joshi has raised a preliminary objection. He contends that the decree which is sought to be executed was passed in a suit in which the plaintiff had claimed to recover Rs. 300 due on a hand loan, and he argues that such a suit being of the nature cognizable by Courts of Small Causes, no second appeal would have been competent against the said decree since the amount or subject-matter of the original suit did not exceed Rs. 500. The expression "suit" used in S. 102 includes execution proceedings with the result that if the suit is of the nature described in S. 102, no second appeal would lie from an order made in execution of the decree passed in such a suit unless the value of the suit exceeds Rs. 500. The test in such cases is not the nature of the proceedings in execution, but the nature of the suit in which the decree sought to be executed was passed. That being so, the preliminary objection is, I think, well-founded and must be accepted. On behalf of the appellant Mr. Gokhale has, however, argued that in view of the importance of the question of law which he is raising in this appeal he should be permitted to convert his second appeal into a revisional application. It is clear that the question of law which arises for decision in these proceedings is of considerable importance, and I think it would not be improper to deal with the said point after allowing the appellant to convert his second appeal into a revisional application.

[4] The material facts in this case are not in dispute. It is obvious that if the period of limitation is held to have started against the decree-holder from the date of the decree sought to be executed his present darkhast is beyond time. It is likewise clear that if the said period is deemed to have commenced from the date of the final decision of the appeal preferred by the defendant against the order passed by the learned Judge dismissing his application for setting aside the *ex parte* decree, the present darkhast would be in time. Thus the question which arises for decision is whether an appeal preferred by a defendant against the order dismissing his application to set aside the *ex parte* decree passed against him falls within sub-para. (2) of col. 3 of Art. 182,

Limitation Act. If it does, limitation must be deemed to commence from the date of the final decree or order of the appellate Court. On this point there is a decision of this Court in *Jivaji v. Ramchandra*, 16 Bom. 123, which supports the judgment-debtor's plea. The facts giving rise to the said appeal were substantially similar. An *ex parte* decree had been passed against the defendant in 1886, whereupon an application was made by the defendant to have the said decree set aside. The said application was dismissed and the appeal preferred by the defendant against the said order was rejected in March 1887. The decree-holder presented a darkhast for execution of the *ex parte* decree in 1889. It was held that the darkhast was time-barred on the ground that limitation could not be deemed to commence from the date of the appellate Court's decision in the appeal preferred by the defendant. Dealing with the expression "the date of the final decree or order of the appellate Court" in cl. (2) of Art. 179 as it then stood it was observed (page 123) :

"But the appeal referred to in that clause is clearly, as appears from the context, an appeal from the decree or order sought to be executed—*Shro Prasad v. Anrudh Singh*, 2 All. 273."

Since the appeal made by the defendant was an appeal not from the decree, but from the order refusing to set it aside, it was held that the decree-holder could not rely upon the date of the appellate order so as to bring his darkhast in time. The decision in *Lutful Huq v. Sumbhudin Pattuck*, 8 Cal. 248: (10 C.L.R. 143) which had taken a contrary view, is dissented from on the ground that "the infructuous efforts of the defendant to set aside the plaintiff's decree cannot have the effect of extending the period within which the plaintiff was allowed by law to execute it." In *Fakir Chand Mandal v. Daiba Charan Parni*, 54 Cal. 1052 : (A. I. R. (14) 1927 Cal. 904) the Calcutta High Court took the same view and held that "decree on appeal" means decree on appeal from the decree to obtain execution of which the application is made, and that an application to set aside a decree does not "keep the decree open," and is not to be regarded as an appeal from the decree itself. In this case the learned Judges explained the decision in *Lutful Huq v. Sumbhudin Pattuck*, 8 Cal. 248: (10 C. L. R. 143) and expressed their dissent from it. The decision in *Jivaji's case*, 16 Bom. 123 was cited before the lower appellate Court; but he was inclined to hold that in view of the decision of the Privy Council in *Nagendra Nath Dey v. Suresh Chandra Dey*, 59 I. A. 283: (A.I.R. (19) 1932 P. C. 165) the authority of the said decision is shaken. That is why he purported to follow the Privy Council decision and found that

the darkhast was in time. It is, therefore, necessary to examine whether as a result of the decision of the Privy Council in *Nagendra's case*, 59 I. A. 283 : (A. I. R. (19) 1932 P. C. 165) it can be held that the decision in *Jivaji's case*, 16 Bom. 123, is no longer good law.

[5] In *Nagendra's case*, 59 I. A. 283 : (A. I. R. (19) 1932 P. C. 165) on 24th June 1920, the Subordinate Judge had delivered his judgment disallowing the claim of one of the parties before him, viz., Madan Mohan, and a final decree was passed for sale of the mortgaged properties that had come to the share of the remaining six judgment debtors. On 27th August 1920, Madan Mohan presented an application to the High Court purporting to be an appeal from the "order" of the Subordinate Judge of 24th June 1920, and he alleged that no decree had been drawn up. The point raised by him in his appeal was confined to the decision against him in respect of the assignment, and he joined as parties to the appeal only the other decree-holders and not the judgment-debtors. In fact a decree had been drawn up and the statement made by the appellant Madan Mohan that he was making an appeal against an "order" on the ground that no decree had been drawn up by the Subordinate Judge was obviously false. At the hearing of the appeal objection was taken to the form of the appeal and the appellant's request for amendment was refused, with the result that the appeal was dismissed both on the ground of irregularity and upon the merits. This dismissal was embodied in a decree of the High Court on 24th August 1922. On 3rd October 1923, the decree-holders presented an application to the Subordinate Judge for execution of the decree by sale of the mortgaged properties. The decree-holders' claim was resisted by some of the judgment-debtors on the ground that it was barred by Art. 182. On their behalf, it was contended that the appeal preferred by Madan Mohan was irregular in form and that to the said appeal they had not been impleaded. It was, therefore, contended that the period of limitation for the purpose of execution of the decree must be deemed to have commenced in 1920 when the Subordinate Judge passed a final decree, and not from the decree passed by the High Court in Madan Mohan's appeal. This plea had not been accepted by the learned Judge in execution proceedings. But the judgment-debtors preferred an appeal to the High Court and the High Court allowed their appeal on the ground that since Madan Mohan's appeal did not imperil the whole decree in question, the *terminus a quo* was the date of the Subordinate Judge's decree and that the application was consequently barred by Art. 182,

Limitation Act. The same contention was urged before the Privy Council in three forms. It was contended that Madan Mohan's appeal was merely an abortive attempt to appeal and not an appeal at all, that the appeal in order to save limitation under cl. 2 of Art. 182 must be one to which the persons affected were parties and that it must also be one in which the whole decree was imperilled. All these contentions were negatived by the Privy Council and it was held by them that the decree-holder's application for execution was in time on the ground that the appeal preferred by Madan Mohan was an appeal falling under cl. 2 in Col. 3 of Art. 182. As such, limitation under the said article would start only from the date of the final decree of the appellate Court in the said appeal. Their Lordships referred to the fact that there is no definition of "appeal" in the Code of Civil Procedure and observed (p. 287):

"But their Lordships have no doubt that any application by a party to an Appellate Court, asking it to set aside or revise a decision of a subordinate Court, is an appeal within the ordinary acceptation of the term, and that it is no less an appeal because it is irregular or incompetent."

Several decisions of the Indian High Courts were cited before the Privy Council, but their Lordships did not think it necessary to discuss "these varying authorities in detail." They took the view that the question must be decided upon the plain words of the article: "where there has been an appeal," time is to run from the date of the decree of the appellate Court. It was held (p. 288):

"There is . . . no warrant for reading into the words quoted any qualification either as to the character of the appeal or as to the parties to it; the words mean just what they say. The fixation of periods of limitation must always be to some extent arbitrary, and may frequently result in hardship."

But their Lordships took the view that

"in construing such provisions equitable considerations are out of place, and the strict grammatical meaning of the words is . . . the only safe guide."

It was further observed (p. 288):

"It is at least an intelligible rule that so long as there is any question *sub-judice* between any of the parties those affected shall not be compelled to pursue the so often thorny path of execution which, if the final result is against them, may lead to no advantage. Nor in such a case as this is the judgment-debtor prejudiced. He may indeed obtain the boon of delay, which is so dear to debtors, and if he is virtuously inclined there is nothing to prevent his paying what he owes into Court. But whether there be or be not a theoretical justification for the provision in question, their Lordships think that the words of the article are plain . . ."

It is quite true that the decision in *Jivaji's case*: (16 Bom. 123) was not cited before the Privy Council and in terms has not been overruled by them. Besides, the point which arose before the Privy Council was somewhat diffe-

rent in the sense that the appeal in question in the said case had not been filed against an order dismissing the defendant's application to set aside an *ex parte* decree. But their Lordships examined the denotation of the word "appeal" in the context and have definitely held that the said word must include any application by a party to an appellate Court, asking it to set aside or revise a decision of a subordinate Court, and they have also held that "so long as there is any question *sub-judice* between any of the parties, those affected shall not be compelled to pursue the so often thorny path of execution." In view of this clear statement of the position it is, I think, difficult to hold that the view taken by this Court in *Jivaji's case* (16 Bom. 123) can be regarded as authoritative any longer. It is obvious that if the appeal preferred by the debtor in the present case had succeeded, the *ex parte* decree passed by the trial Court would have been set aside and the suit would have been restored to file and remanded for trial on the merits. Indeed, the Privy Council did not think it necessary to consider the several decisions of the Indian High Courts and they based their decision upon what was regarded by them to be the effect of the plain words of the article. That being so, it seems to me that Courts in India are bound by the view thus expressed by the Privy Council, though the facts on which the point arose for decision in that particular case were not identical with those in the present case. It is well-settled that even the *obiter* of the Privy Council are binding upon the Indian Courts and must be respected: *vide Shrinivas Sarjerav v. Balwant Venkatesh*, 37 Bom. 513, 521: (20 I. C. 162), *Nagappa Balappa v. Ramchandra*, 48 Bom. L. R. 225: (A. I. R. (33) 1946 Bom. 365), *Rama Appa v. Tippaya Appaya*, 45 Bom. L. R. 186, 190: (A. I. R. (30) 1943 Bom. 95), *Shri Nath Sah v. Official Liquidator, Benares Bank*, I. L. R. (1941) ALL. 153, 158: (A. I. R. (27) 1940 ALL. 544 (F. B.)), *Jogendra Narayan Dhar v. Askar Ulla*, I. L. R. (1937) 1 Cal. 455: (A. I. R. (24) 1937 Cal. 27). That being so, I think it must be held that the decision in *Jivaji's case* (16 Bom. 123) can no longer be regarded as good law.

[6] In this connexion it may be relevant to refer to another decision of this Court, *viz.* in *Nagappa Bandappa v. Gurushantappa Shankrappa*, 57 Bom. 388: (A. I. R. (20) 1933 Bom. 255). In that case a decree had been passed in 1925 and an appeal had been preferred against it. Meanwhile the defendant had applied for a review of the decree in March 1926, and in July of the same year the review application was allowed and the amount under the decree was reduced. An appeal was preferred against the order granting the review application, but no appeal

had been filed against the decree which had been drawn in pursuance of the order granting the review. Eventually, the appeal against the original decree as well as that against the order granting review were dismissed as incompetent. In August 1929, the decree-holders having assigned their rights the assignee applied in September 1929, for a transfer of the decree to another Court for execution. The judgment-debtor opposed the decree-holder's claim on the ground that the darkhast was barred by limitation since it had been filed more than three years from July 1926, when another decree was drawn after the review application was allowed. His plea was accepted by the Court of first instance, but on appeal it was negatived. The decision of the Privy Council in *Nagendra's case*, 59 I. A. 283 : (A. I. R. (19) 1932 P. C. 165) was strongly relied upon by the decree-holder in support of his contention that the darkhast was in time. While deciding the point, Patkar J. observed that it was unnecessary to go into the cases cited in the judgment of the lower Court, for he held that the question had to be decided in the light of the Privy Council decision in *Nagendra's case*, 59 I. A. 283 : (A. I. R. (19) 1932 P. C. 165). In this case again the facts were somewhat different, and the decision in *Jivaji's case* (16 Bom. 123) was not cited before the Court. But if the test which had been accepted by this Court in *Jivaji's case*, (16 Bom. 123), viz., that the appeal referred to in sub-para. (2) of col. 3 of Art. 182 must be an appeal from the decree or order sought to be executed, had been applied to the facts in *Nagappa's case*, 57 Bom. 388 : (A. I. R. (20) 1933 Bom. 255) the answer would certainly have been that the darkhast giving rise to the said appeal was beyond time. There was admittedly no appeal against the decree which had been passed in July 1926, and it was that decree which was sought to be executed by the decree-holder and not the decree which was passed in 1925. It would thus appear that after *Nagendra's case*, (59 I. A. 283 : A. I. R. (19) 1932 P. C. 165) this Court did not construe the word 'appeal' in Art. 182 in the narrow sense in which it had been construed in *Jivaji's case* (16 Bom. 123).

[7] A similar question had been raised before the Patna High Court in *Firm Dedhraj Lachminarayan v. Bhagwan Das*, 16 Pat. 306 : (A. I. R. (24) 1937 Pat. 337). It was held by the Patna High Court that the expression "where there has been an appeal" in cl. (2) does not mean that the appeal must be against the decree in the suit. It also includes an appeal against an order made on an application for rehearing under O. 41, R. 21 of the Code. In support of this decision, reliance was placed on *Nagendra's case*, (59 I. A. 283 : A. I. R. (19) 1932 P. C. 165) as well as the decision

of this Court in *Nagappa's case*, (57 Bom. 388 : A. I. R. (20) 1933 Bom. 255). It may incidentally be mentioned that an earlier decision of the Patna High Court in *Rai Brijraj v. Nauratan Lal*, 3 Pat. L. J. 119 : (A. I. R. (4) 1917 Pat. 157) where a contrary view had been accepted, was not followed on the ground that it was no longer good law.

[8] This same question has been considered by the Madras High Court in *Sriramachandra v. Venkateswara*, I.L.R. (1939) Mad. 252 : (A. I. R. (26) 1939 Mad. 157). On facts very similar it has been held by the Madras High Court that the word 'appeal' in col. 3 of Art. 182 means and includes "an appeal in the suit which is likely to affect the decree sought to be executed" and not merely an appeal against the actual decree or order sought to be executed. The decision of the Privy Council in *Nagendra's case* (59 I. A. 283 : A. I. R. (19) 1932 P. C. 165) was followed and that of the Patna High Court in *Firm Dedhraj Lachminarayan v. Bhagwan Das*, (16 Pat. 306 : A. I. R. (24) 1937 Pat. 337) was referred to with approval. The contrary view expressed by the Calcutta High Court in *Fakir Chand Mandal v. Daiba Charan Parni* 54 Cal. 1052 : (A. I. R. (14) 1927 Cal. 904) was not followed.

[9] It seems to me that in view of the Privy Council decision in *Nagendra's case* (59 I. A. 283 : A. I. R. (19) 1932 P. C. 165) and in view of the later decision of this Court in *Nagappa's case*, (57 Bom. 388 : A. I. R. (20) 1933 Bom. 255) it must be held that the word 'appeal' in col. 3 of Art. 182 includes an appeal against an order rejecting the defendant's application for setting aside the *ex parte* decree. That being so, the period of three years prescribed by Art. 182 must be deemed to have commenced from the date when the defendant's appeal in question was dismissed. In that case the darkhast is clearly in time.

[10] The result is the view taken by the lower appellate Court and the order passed by him are right and must be affirmed. The revisional application accordingly fails and is dismissed with costs.

R.G.D.

Revision dismissed.

A. I. R. (36) 1949 Bombay 119 [C. N. 37.]

SEN AND DIXIT JJ.

Subbappa Mallappa Huballi—Appellant v. P. L. Bonni—Respondent.

Second Appeal No. 769 and Appeal No. 770 of 1943, Decided on 21st February 1947, from order of Civil Judge (Senior Division), Dharwar, in Appeal No. 138 of 1942.

(a) Bombay Municipal Boroughs Act (XVIII [18] of 1925), Ss. 81, 84 (2)—Revised assessment list becomes effective at commencement of official year.

Section 84 (2) shows that the provisions of Ss 80, 81 and 82 are to be applied every year as though a new assessment list has been completed at the commencement of the official year, which according to the definition in S. 3 (13) of the Act means the first day of April. The effect of sub-s. (2) of S. 84 is that it is applicable both to an annual assessment list as well as to a revised assessment list prepared once in every four years; so that, an annual assessment list or a revised assessment list becomes effective at the commencement of the official year, i.e., from April 1. [Para 15]

The contention that the assessment list does not become effective until it is made final, that is to say, until after the objections are considered and amendments made as contemplated by S. 81 (3) (c) and after the result of an appeal or a revision, if any, under S. 110, is not correct. [Para 16]

The liability to pay the tax arises independently of the objections or of the disposal of the objections and it is not as if that the plaintiff is without a remedy. If his objections are upheld, it only means that he is entitled to a refund of the amount paid in excess : A. I. R. (8) 1921 Bom. 236. *Expl.* [Para 20]

(b) Bombay Municipal Boroughs Act (XVIII [18] of 1925), S. 58 (j) Rules under Rr. 6 and 7—Rules are merely directory and not imperative: (1876) 2 Q. B. D. 199, *Ref.* [Para 19]

S. B. Jathar and R. B. Kotwal—for Appellant.

R. A. Jahagirdar—for Respondent.

Dixit J.—The suit giving rise to these two appeals was filed under the following circumstances.

[2] Plaintiff 1 owns three houses which are municipal Nos. 7717, 7724 and 7739 and which are situate within the limits of the Hubli Municipality. As owner of these houses the plaintiff has to pay certain taxes, viz. (1) house-tax, (2) general water tax and (3) sanitary cess. In respect of these taxes he was assessed for 1938-39 to pay respectively Rs. 10, Rs. 24 and Rs. 3-8-0 in all Rs. 37-8-0.

[3] It appears that the Municipality was in January 1939, superseded and under S. 219 (2) (b), Bombay Municipal Boroughs Act, 1925, an administrator was appointed.

[4] On 31st March 1939, the Chief Officer of the municipal borough issued notice under Ss. 80 and 81 of the Act calling upon all persons interested in the new revised assessment list for 1939-40 to inspect it and to file objections against the valuation or assessment on or before 15th May 1939. On 15th April 1939, plaintiff 1 received notice of the proposed increased and revised taxes. About ten thousand persons also received similar notices at about the same time. Upon an inspection of the new assessment list plaintiff 1 noticed that the taxes of his houses had been increased. This too happened in the case of other persons also. Plaintiff 1 lodged his objections to the revised assessment and so did others also. The plaintiff's objections were heard on 9th August 1939, and on 18th August 1939, and in regard to the first house the revising authority reduced the assess-

ment to Rs. 10; in regard to the second house it was reduced to Rs. 29 and he confirmed the revised assessment in respect of the third house. Thereafter bills for payment of the above taxes were presented to the plaintiff on 29th September 1939. On 18th October 1939, plaintiff 1 was informed of the result of the hearing of his objections which was that plaintiff 1 had to pay Rs. 48-8-0 which showed an increase of Rs. 11 over the previous assessment.

[5] On 2nd October 1939, plaintiff 1 sent to the defendant a notice under S. 206 of the Act and S. 80, Civil P. C., to which the defendant replied on 6th October 1939, saying that the assessment levied was legal.

[6] On 13th December 1939, plaintiff 1 filed against the Administrator, Hubli Municipal Borough, the present suit for a declaration and injunction — declaration that the revised new assessment list and enhancement of taxes for the year 1939-40 were illegal, and injunction that defendant be restrained permanently from collecting illegally such taxes from the plaintiff and others on whose behalf the suit was brought. The plaintiff alleged that the action of the defendant in preparing the revised assessment list was illegal and *ultra vires* and had contravened the provisions of the Act in not revising the same completely. He also alleged that the defendant had not complied with the provisions of the Act and the bye-laws made thereunder, that the notices issued by the Chief Officer under Ss. 80 and 81 of the Act were illegal and that the assessment and enhancement were not made legally. In paragraph 10 of the plaint it was stated as follows :

"Plaintiff sent notice to the defendant as required by law on 2nd October 1939, and defendant by his letter dated 6th October 1939, replied that the assessment was legal and that the plaintiff may go to the Court if he is dissatisfied. Hence the plaintiff is forced to file this suit on his own behalf and also on behalf of others similarly affected for a declaration that the revised assessment list and enhanced taxes are illegal and also for injunction restraining defendant from recovering the same from persons mentioned above."

Some time after the suit was filed plaintiff 1 paid the amount of the taxes.

[7] The defendant, by his written statement, contended that the assessment lists were completely revised, that the revision was legal and *intra vires*, that no provisions of the Bombay Municipal Boroughs Act had been contravened, that the provisions of Ss. 80 and 81 of the Act had been complied with, that the plaintiffs were bound to pay the enhanced taxes according to the list published on 31st March 1939, that the non-observance of any of the rules mentioned by the plaintiffs would not vitiate the assessment lists nor bar the recovery of the taxes, that the

defendant being a public officer was entitled to a notice under S. 80, Civil P. C., that the notice given did not contain the necessary particulars and so was defective, that the suit was barred by limitation under S. 206 of the Act, that all the properties being vested in His Majesty by reason of S. 219 of the Act, Government was a necessary party and that as the interest of all the plaintiffs was not the same, a representative suit did not lie.

[8] Upon these pleadings, the learned trial Judge raised several issues, some of which he tried as preliminary issues. His findings were that the notice given by the plaintiff complied with the requirements of S. 206 of the Act, that the suit was not barred by limitation under S. 206 of the Act, that the jurisdiction of the Court to try the suit was not barred by reason of S. 32, Bombay Civil Courts Act, that the Secretary of State was not a necessary party to the suit, that the notice given by plaintiff 1 was not available to plaintiffs other than plaintiff 1, that the representative suit on behalf of the "other taxpayers whose taxes were enhanced" was not maintainable, that co-plaintiffs 2 to 94 were not entitled to remain on record as plaintiffs and that the value of the suit for calculating pleaders' fees was Rs. 65. Accordingly, the learned trial Judge by his judgment dated 20th February 1942, directed that the names of plaintiffs 2 to 94 should be struck off as they had not given the notices under S. 206 of the Act, that the suits should continue so far as it related to the individual interest of plaintiff 1 and that the suit should be heard on the remaining issues.

[9] Thereafter, the learned trial Judge proceeded to hear the suit with respect to the remaining issues which he answered by saying that the procedure prescribed by the Municipal Boroughs Act in the rules and the bye-laws of the Municipality was not followed in the particulars mentioned in the plaint and that the enhancement of the assessment was vitiated thereby. In the result he passed in favour of plaintiff 1 a decree declaring that the enhancement of Rs. 11 in the three taxes, viz. (1) house-tax, (2) water rate and (3) sanitary cess in respect of the plaintiff's three houses for the year 1939-40 was illegal. He made a further order saying that in view of the declaration it was recommended that the Municipality should consider any application which the plaintiff might make for the refund of the amount of Rs. 11 recovered from him for the year 1939-40. This order was made by him on 31st March 1942.

[10] Against that decree, the defendant filed in the District Court, Dharwar, Appeal No. 188 of 1942 and plaintiffs 1 to 94 filed Appeal No. 189 of 1942 in the same Court. The learned

First Class Subordinate Judge with appellate powers allowed the defendant's appeal and dismissed the plaintiff's appeal, holding that the enhancement of Rs. 11 in respect of the taxes payable by plaintiff 1 in regard to the three houses was not illegal and that it was not open to plaintiff 1 to bring the suit under O. 1, R. 8, Civil P. C., on behalf of the other tax-payers who had not given notices under S. 206, Bombay Municipal Boroughs Act. It is from these appellate decrees that the present appeals have been brought. It may be mentioned that second appeal No. 769 of 1943 has been brought by plaintiff 1 in his individual capacity while Second Appeal No. 770 of 1943 has been brought by him in his representative capacity. It may also be mentioned that the respondent to these appeals is the Chief Officer of the Hubli Municipality.

[11] On these appeals, it has been argued that the municipality had no right to recover for 1939-40 the increased amount of taxes. It is said that the plaintiff's liability is governed not by the preliminary list published under the provisions of S. 80 and S. 81 (1) of the Act but the same is governed by the final list as would emerge in consequence of the amendments made in accordance with S. 81 (3) (c) of the Act. It is also said that the defendant cannot recover the increased amount of the taxes determined at any time during the year.

[12] In support of this contention, reliance is placed upon certain provisions of the Act and the rules framed thereunder. It is, therefore, necessary to turn to the material provisions of the Act. Section 3 (13) provides that "official year" shall mean the year commencing on the first day of April. Section 37 provides for the formation of a standing committee and defines its powers. Section 58 provides by cl. (j) that the Municipality shall make rules not inconsistent with this Act and may from time to time alter or rescind them, prescribing the taxes to be levied in the municipal borough for municipal purposes . . . and the time at which and the mode in which such taxes, charges, payments, fees or rates shall be levied or recovered or be payable and the persons authorised to receive payment of the same . . . The subject of municipal taxation is dealt with in Chap. 7. By S. 73 the Municipality is given power to impose certain taxes. Section 73, cl. (i) refers to the rate on buildings or lands or both situate within the Municipal Borough; cl. (vii) refers to a special sanitary cess and cl. (x) refers to a general water-rate. Under S. 75 the Municipality before imposing taxes has to observe preliminary procedure as laid down in that section. According to that procedure, the Municipality has to approve certain rules prepared for the purposes of cl. (j) of

S. 58. According to S. 76, after the rules are sanctioned by Government they are required to be published by the Municipality in the manner as laid down in that section. It is after these formalities are observed that one gets in S. 78 the mode in which an assessment-list is to be prepared. Section 80 provides that when the assessment-list has been completed, the Chief Officer shall give public notice thereof and of the place where the list or a copy thereof may be inspected; and every person claiming to be either the owner or occupier of property included in the list, and any agent of such person, shall be at liberty to inspect the list and to make extracts therefrom without charge. According to S. 81 (1) the Chief Officer has at the time of the publication of the assessment-list under S. 80 to give public notice of a date not less than one month after such publication, before which objections to the valuation or assessment in such list shall be made. By sub-s. (2), it is provided that the objections to any such list shall, if the owner or occupier of such property desires to make an objection, be made by such owner or occupier or any agent of such owner or occupier to the standing committee before the time fixed in the aforesaid public notice, by application in writing, stating the grounds on which the valuation or assessment is disputed; all applications so made shall be registered in a book to be kept by the standing committee for the purpose. Sub-section (3) (a) and (b) of S. 81 then goes on to provide that the standing committee shall investigate and dispose of the objections and cause the result thereof to be noted in the book kept under sub-s. (2). Section 81 (3) (c) provides that the standing committee, after allowing the applicant an opportunity of being heard in person or by agent, shall cause any amendment necessary in accordance with such result to be made in the assessment-list. Sub-section (4) of S. 81 provides for authentication of the assessment-list and sub-s. (6) then goes on to provide that subject to such alterations as may be made therein under the provisions of S. 82 and to the result of any appeal or revision made under S. 110, the entries in the assessment-list so authenticated and deposited and the entries, if any, inserted in the said list under the provisions of S. 82 shall be accepted as conclusive evidence. Sub-section (1) of S. 82 empowers the standing committee to alter the assessment-list in respect of any property in the circumstances mentioned in that section. By sub-s. (2) of S. 82, an objection made by any person interested in the alteration has to be dealt with in the manner laid down in S. 81 (2), and S. 82 (3) speaks of the effect of amendment.

[13] Section 84 provides as follows :

“(1) It shall not be necessary to prepare a new

assessment-list every year. Subject to the condition that every part of the assessment-list shall be completely revised not less than once in every four years, the Chief Officer may adopt the valuation and assessment contained in the list for any year, with such alterations as may be deemed necessary, for the year immediately following.

(2) But the provisions of Ss. 80, 81 and 82 shall be applicable every year as if a new assessment-list had been completed at the commencement of the official year.”

[14] Section 104, sub-s. (3) says that if the sum for which any bill has been presented as aforesaid is not paid at the municipal office or to a person authorized by any rule in that behalf to receive such payments, within 15 days from the presentation thereof, the Chief Officer may cause to be served upon the person to whom such bill has been presented, a notice of demand in the form of Sch. 5 or to the like effect. Section 110 provides for preferring appeals to Magistrates within 15 days next after service of notice of demand complained of.

[15] Section 84 (1), the terms of which I have set out above, contemplates two things : (1) preparation of an assessment-list and (2) complete revision of an assessment-list once in every four years. Section 84 (2) shows that the provisions of Ss. 80, 81 and 82 are to be applied every year as though a new assessment-list has been completed at the commencement of the official year, which according to the definition in S. 3 (13) of the Act means the first day of April. In our opinion, the effect of sub-s. (2) of S. 84 is that it is applicable both to an annual assessment-list as well as to a revised assessment-list prepared once in every four years; so that, an annual assessment-list or a revised assessment-list becomes effective at the commencement of the official year, i.e., from 1st April.

[16] It is contended that the assessment-list does not become effective until it is made final, that is to say, until after the objections are considered and amendments made as contemplated by S. 81 (3) (c) and after the result of an appeal or a revision, if any, under S. 110. We are unable to accept this contention. Section 82 (3) shows that although amendments are made in the course of the year they become effective from the commencement of the year. Section 82 refers to alterations made in consequence of the discovery of fraud, accident or mistake or in consequence of the completion of a building after the preparation of an assessment-list. In such a case the assessment-list becomes effective as though from the commencement of the official year. It is said that S. 84 refers only to an annual assessment-list and not to a revised assessment-list once in every four years and that although the annual assessment-list becomes

effective as if it had been completed at the commencement of the official year, the revised assessment-list does not become effective until the objections are heard, amendments made or the result of an appeal or a revision is known. We do not think that such a construction of S. 84 is justified.

[17] It is said that whereas retrospective effect is contemplated by S. 82, no such effect is contemplated by S. 81, and it is, therefore, argued that it must be the intention of the Legislature that the revised assessment-list does not become effective until after the disposal of the objections or until after the result of an appeal or revision is known. We do not think that such a construction is justified either. Sections 78, 79, 80 and 81 deal with the procedure which is to be followed in regard to an assessment-list. Section 81 lays down the stages before an assessment is authenticated. Section 82 deals with a special subject and S. 84 deals generally with an annual assessment-list and a revised assessment-list once in every four years. The omission, therefore, to make in S. 81 a provision similar to the one contained in S. 82 is not at all of any significance. The subject of an annual assessment-list or a revised assessment-list is dealt with in S. 84 and retrospective effect to an annual assessment-list or to a revised assessment-list is given by virtue of sub-s. (2) of S. 84. To hold that an assessment list is not effective from the commencement of the official year and that it will become effective only after the procedure laid down in S. 81 is followed, would involve many difficulties. It may be that a number of persons may prefer objections. It may also be that those objections may not be disposed of as expeditiously as possible. Again, it may be that appeals may be preferred against notices of demand under S. 110 and it may well be that those appeals may not be heard as expeditiously as possible. That is why it is enacted both in S. 82 (3) and S. 84 (2) that an assessment-list becomes effective as though from the commencement of the official year. If an assessment-list as contemplated by S. 82 can become effective from the commencement of the year in which case too the provisions of S. 81 (2) are to be followed, it is difficult to see why in the case of revised assessment-list it should not be effective from the commencement of the official year in which case too the procedure laid down in S. 81 has also to be followed. In the one case the amendments may be few; in the other the amendments may be numerous. But there is no sound reason to suggest why whereas in the one case it should take effect from the commencement of the official year, in the other case it should not take effect also from the commencement of the official year.

[18] The learned advocate for the appellant has strongly relied upon a decision reported in *Ambalal Sarabhai v. Ahmedabad Municipality* 23 Bom. L. R. 48 : (A. I. R. (8) 1921 Bom. 236). In that case this Court was considering the effect of an assessment-list prepared under the provisions of the Bombay District Municipal Act, 1901. The tax which was the subject of dispute was the house and property tax which was levied by the Municipality of Ahmedabad for 1911-12. The Municipality published the revised list of assessment on 24th April 1911, and the official year commenced on 1st April 1911. According to R. 74 of the rules framed by the Municipality certain dates were fixed in regard to the preparation of the assessment-list. Those dates were that on 1st February in every year the Chief Officer was to place before the managing committee the return of all the houses subject to the payment of the house and property tax, that the managing committee after adopting or amending the alterations prescribed was to notify to the house-owners before 1st March, that the objections to alterations were to be lodged before 15th March, and that the managing committee after investigation was to communicate its decision to the owner or tenant before 1st April, when the payment of the tax was to be considered as due on that day. In spite of this rule, the Municipality gave to the plaintiff a notice of the proposed increase in the house and property tax on 20th June 1911. Thereafter the plaintiff filed objections on 12th July 1911, which were heard on 22nd December 1911, after which the tax was confirmed and a formal notice of demand was made on 27th January 1912. The plaintiff paid the amount of the tax under protest and sued the Municipality for a declaration that the valuation made by the defendant of his properties was made against rules and was illegal. The trial Court decreed the plaintiff's claim in part which was modified in appeal. On second appeal to this Court, it was held that the rule was binding equally upon the municipality and the house-owners; and that its non-compliance by the Municipality entitled the plaintiff, who was the house-owner, to recover what was levied from him by way of house and property tax in excess of what was payable by him at the beginning of the year. It is to be noted that in that case the Municipality had by R. 74 fixed certain dates, all before 1st April, on which date the tax was to be considered as due. It is also to be noted that the Municipality published the revised list of assessment-list on 24th April 1911, which was after the commencement of the official year and after the date fixed by the rule as the date of payment. It is in reference to these facts and the rule in question that this Court was consi-

dering the question. At page 53, Shah J. observed as follows:

"The effect of the rule seems to me to be that for the year 1911-12 the Municipality would be entitled to such amount as is determined by the beginning of the year and not to any increase that may be determined at any time during the year. I am unable to agree with the lower appellate Court on this point. The question is not whether the levy of the tax is illegal apart from Rule 74, but the question to my mind is as to what was due to the Municipality by the present plaintiff by way of house and property tax according to law. The rule distinctly indicates that the amount payable for the year is the amount fixed at the commencement of the year. Unless the increased amount was determined in the manner contemplated by Rule 74 the only amount that could be said to be due by the owner for 1911-12 was the amount which was fixed for the next preceding year. I do not see anything unreasonable in this rule, and if it is consistent with the provisions of the present Act, I am of opinion that it should be given effect to. If effect is given to it, it follows that the levy of the increased tax for the year 1911-12 was not justified."

In considering the effect of S. 67 (2) which corresponds to S. 84 (2) of the present Act, Shah J. further observed as follows (p. 53):

"On a careful consideration of the scheme of Ss. 63, 64, 65, 66 and 67, it is clear that under sub-section (2) of S. 67 it is permissible to the Municipality to deal with the matters arising under Ss. 64, 65, 66 after the commencement of the official year in question. But there is nothing in the Act to show that the matters intended to be dealt with under S. 65 must necessarily be dealt with after the commencement of the official year."

It is true that there are certain observations in the judgment of Shah J., which seem to support the contention raised on behalf of the appellant, but on a careful examination of the facts of that case and bearing in mind the terms of the rule which was under consideration, we think, with respect, that the Court was justified in holding that the plaintiff was not liable to pay the amount of the increased tax.

[19] We are next referred to the rules framed by the Municipality. According to R. 1, Ex. 74, the house-tax is payable in one instalment in advance in the beginning of every official year by the owners or their agents and in their absence by the occupants. According to R. 5 the managing committee or chief officer shall under S. 82 of the Act cause a bill for the rate due to be presented to the person liable for the payment of it at the commencement of each official year. These rules show that the plaintiff had to make payment in respect of the house-tax in April 1939. In respect of the water-tax Rule 6 (Ex. 76) provides that the water rate shall be payable in advance on 1st April in one instalment for the whole of the official year, no refund being allowed under any circumstances. This also shows that the water-tax is payable on the commencement of the official year. With regard to the sanitary cess the Rules are a little different. The material rules are 5, 6, 7 and 8. According to

R. 6 (Ex. 75) the tax becomes payable in the month of May. According to rule 7 an appeal against the levy of assessment of the general sanitary cess is to be made to the general committee within one month from the publication of the assessment-list and the appeal is to be disposed of before the end of April. It is suggested in reference to the rules relating to the sanitary cess that the liability would arise only after the appeal is disposed of before the end of April. It is also suggested that since the tax is payable in the month of May, therefore, the same becomes due after the objections, if any, are disposed of. If the meaning of Rr. 6 and 7 is that the liability to pay the tax does not arise on 1st April, the rules are, in our view, *ultra vires*. But these rules are in our opinion merely directory and not imperative: see *The Queen v. Ingall* (1876) 2 Q. B. D. 199: (46 L. J. M. C. 113). In that case the Court was considering the effect of the provisions of the Valuation (Metropolis) Act, 1869. There was delay in making, depositing, transmitting, and approving the valuation list within the times prescribed by S. 42 of the Valuation (Metropolis) Act, 1869, and the Court held that delay did not make it a nullity, for the provisions of that section were directory and not imperative. With regard to the construction of the Act this is what Lush J. said (p. 208):

"But we must, in construing the Act, strike a balance between the inconvenience of holding the list to be null and void and the risk of allowing injury to be done by the delay in making the list; the former seems to me the greater evil, and therefore in my opinion we ought to hold the list to be valid."

[20] In the present case the assessment-list was admittedly published on 31st March 1939. It may be that the plaintiff raised objections to the assessment and those objections were not considered until August, 1939. It may also be that it was not until 18th October 1939, that he was informed of the result of the hearing of his objections. Even so, we are unable to hold that the plaintiff's liability would arise not on 1st April 1939, but that it would arise only when his objections are considered and disposed of, and after a final assessment-list is made. In our opinion, the liability to pay the tax arises independently of the objections or of the disposal of the objections and it is not as if that the plaintiff is without a remedy. If his objections are upheld, it only means that he is entitled to a refund of the amount paid in excess. We reject the plaintiff's contention and hold that the claim of the defendant to recover the increased taxes payable by the plaintiff in regard to his three houses was legal and justified. [His Lordship then dealt with the other contentions in the case and concluded:] The result of the above discussion is that the appellant fails except on the question of the

pleaders' fees. The decree of the lower appellate Court will, therefore, be varied to that extent. Subject to this variation, both the appeals fail and must be dismissed with costs.

V.B.B.

*Decree varied.***A. I. R. (36) 1949 Bombay 125 [C. N. 38.]**

CHAGLA C. J. AND GAJENDRAGADKAR J.

P. V. Rao — Appellant v. Ahmed Haji Noormahomad Latiff — Respondent.

O. C. J. Appeal No. 36 and Misc. No. 88 of 1948, Decided on 12th July 1948, from judgment of Bhagwati J.

(a) Government of India Act (1935), S. 59—Order expressed in name of Governor and duly authenticated as provided by rules framed under S. 59—Court must assume that order is executive order—Party cannot challenge order as not being executive order—Party can, however, challenge it on ground that certain provisions of law called for judicial and not executive order.

As soon as an order is tendered and it is expressed in the name of the Governor and duly authenticated as provided by the rules framed under S. 59, it is not open to a Court of law to question the authenticity of the order to the extent that the order is the order of the Provincial Government. *Ex facie*, the order must be accepted and the Court must proceed on the assumption that the order is an executive order issued by the Provincial Government.

It is not open to a party to challenge a particular order which the Provincial Government chooses to issue as an executive order, as being not an executive order but some other order. Whether the Government is entitled in law to issue an executive order or not is entirely a different matter and S. 59 does not in any way take away the liberty of the subject to challenge orders of Government as being bad or invalid or *ultra vires* on the ground that certain provisions of law called for judicial orders and not executive orders. [Para 1]

Annotation : ('46-Man.) Government of India Act 1935, S. 59, N. 1.

(b) Letters Patent (Bom.) Cl. 15 — "Judgment" meaning of — Merits of question between parties must be affected by some right or liability being determined — Order purporting to be that of Provincial Government — Order for attendance of deponent of affidavit for cross-examination held in circumstances of case, to be judgment.

In order that an order of the Judge should be a "judgment" within the meaning of Cl. 15, it must affect the merits of the question between the parties by determining some right or liability. [Para 2]

Where an order purporting to be by the Provincial Government is issued and is duly authenticated as provided by the rules under S. 59, Government of India Act 1935, the fact of its being an order by the Provincial Government cannot be challenged in a Court of law under S. 59 Government of India Act. Where in such a case, a petition is filed for the issue of a writ of certiorari against the officer who has signed the order and it is alleged that the order is not that of the Provincial Government but of the officer who has signed it, where further, the officer in question has filed an affidavit in support of his contention that the order is that of the Provincial Government and not of himself, and the Court issues an order for the personal attendance of the officer in Court for cross-examination, the order amounts to a "judgment." It is an order passed under

a misapprehension of the extent of its jurisdiction by the Court. The order further decides on the merits of the question whether it is open to the Court not to accept the impugned order at its face value. It also determines the rights of the parties because the officer concerned has the right to have the petition dismissed against him inasmuch as the petition is not served on the proper party which made the order and he has a right to have the petition so dismissed on the strength of the order as it stands and as it is made: 9 Cal. 482 (P. C.) and 4 Bom. L. R. 342, *Applied*. [Para 5]

Annotation: ('44-Com.) Civil P. C., L. P. Cl. 15, N. 2 Pt. 9.

(c) Civil P. C. (1908), S. 151 — Court can never have inherent right to hear appeal unless law so expressly provides — Order passed by single Judge on original side not amounting to judgment within Cl. 15, Letters Patent—High Court has no inherent right to sit in appeal from that order — Letters Patent (Bom.), Cl. 15.

Appeals are creatures of statutes and a Court can never have an inherent right to hear an appeal from another Court unless the law so expressly provides.

Where an order passed by a single Judge on the original side of the High Court does not amount to a judgment within the meaning of Cl. 15, Letters Patent the High Court has no inherent right to sit in appeal from that order even if the order is wrong and likely to do substantial injustice: A. I. R. (18) 1931 Bom. 193, *Expl.* [Para 2]

Annotation : ('44-Com.) Civil P. C., S. 151, N. 3, Pt. 5.

(d) Precedents—Co-ordinate benches — Decision of one division bench is binding on a subsequent division bench of the same High Court. [Para 2]

M. P. Amin Acting Advocate General and G. N. Joshi — for Appellant.

P. P. Khambatta and H. D. Banaji —

for Respondent.

Chagla C. J. — This is an appeal from an order made by Bhagwati J. granting the application of the petitioner to order the attendance of Mr. P. V. Rao, for cross-examination under R. 180 of the High Court Rules. The facts briefly are these. An order for requisition was served on the petitioner under the Bombay Land Requisition Ordinance No. 5 of 1947, and this order has been challenged by the petitioner and he has prayed for a writ of certiorari against Mr. P. V. Rao. The order is signed by Mr. P. V. Rao as Assistant Secretary to the Government of Bombay, Health and Local Government Department, but the order in terms says that the order is issued by the order of the Government of Bombay. Now, one of the contentions taken up by Mr. Rao is that the petition is misconceived inasmuch as the order is made not by him, Mr. Rao, but by the Government of Bombay, and as the petitioner seeks to have a writ of certiorari issued against him personally, the petition cannot succeed. On the petition, affidavits were made by the parties and Mr. Rao has made an affidavit setting out his contentions and alleging that the order in question is the order of the Government of Bombay and not his order. The petitioner then applied to the learned Judge that he should be

permitted to have the deponent, viz., Mr. Rao, cross-examined under R. 180 of the High Court Rules. And that rule is in these terms :

"Upon any motion, petition or summons, evidence may be given by affidavit, but the Court or a Judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit."

The Advocate-General for the appellant and the respondent to the petition has contended that the order made by the learned Judge is in excess of his jurisdiction and that it was not open and competent to the learned Judge to question the order in view of the mandatory provisions of S. 59, Government of India Act. Now, S. 59, Government of India Act, provides that all executive action of the Government of a Province shall be expressed to be taken in the name of the Governor. Therefore, if the Government of the Province acts at all and its acts are to be clothed in the form of an order, that order can only be issued in the name of the Governor, and sub-cl. (2) provides that orders and other instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in the rules to be made by the Governor, and in this case it is not disputed that according to the rules framed the proper way of authenticating an order made by the Government of Bombay is for the Assistant Secretary to the Government to sign that order; and sub-cl. (2) further provides that the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor. Therefore, as soon as the order is tendered and the order is expressed in the name of the Governor and duly authenticated as provided by the rules framed under S. 59, it is not open to a Court of law to question the authenticity of the order to the extent that the order is the order of the Government of Bombay. *Ex facie* the order must be accepted and the Court must proceed on the assumption that the order is an executive order issued by the Government of Bombay. What the learned Judge, with very great respect to him, has done is that he has permitted the petitioner to call the order in question by getting an order from the learned Judge that Mr. Rao should be put in the witness-box to be cross-examined for the purpose of ascertaining whether the order was made by the Government of Bombay or not. Now, the law provides that the only way of ascertaining whether a certain order was made by the Government of Bombay or not is as laid down in S. 59, Government of India Act. There is no other mode by which that fact can be ascertained. What the learned Judge has done is that he has accepted the application of the

petitioner whereby he wants to ascertain whether the order was in fact made by the Government of Bombay or not, by a method which the law does not permit. There can be no doubt that that is the only reason why Mr. Rao is to be submitted to cross-examination, because the learned Judge in his judgment in terms says :

"I have come to the conclusion that I should give the petitioners an opportunity of proving by cross-examination of the respondent P. V. Rao that the orders complained of were not really the orders made by the Government of Bombay in exercise of the powers vested in them under the Ordinance No. 5 of 1947 but were orders really issued and passed by the respondent P. V. Rao purporting to do so in the name of the Government of Bombay."

It is to be noted that the petitioner in his petition has not challenged that Mr. Rao in making the order was acting in his capacity as Assistant Secretary to the Government of Bombay. It is not suggested that the order was an order personally made by Mr. Rao otherwise than in his capacity as Assistant Secretary to the Government of Bombay and therefore that particular question does not arise before us. Mr. Khambatta has argued that it is the contention of the petitioner that the order made is not an executive order but a judicial or a quasi-judicial order and for that purpose he is entitled to cross-examine Mr. Rao. That, in our opinion, is an entirely fallacious contention. Whether a particular order is an executive order or not is to be determined according to the terms of that order. This order is purported to have been made under S. 59, Government of India Act. It is made in the name of the Governor, it is authenticated as provided by sub cl. (2), and therefore there can be no doubt that it is in pursuance of an executive action that this order has been made. It was open to Mr. Khambatta to contend that the orders to be made under the Requisitioning Order have to be judicial orders and not executive orders, and inasmuch as this is an executive order it is a bad order. But that is something very different from challenging this order itself as not an executive order. It is not open to a party to challenge a particular order, which the Government of Bombay chooses to issue as an executive order, as being not an executive order but some other order. Whether the Government of Bombay is entitled in law to issue an executive order or not is entirely a different matter, and S. 59 does not in any way take away the liberty of the subject to challenge orders of Government as being bad or invalid or *ultra vires* on the ground that certain provisions of law called for judicial orders and not executive orders. In our opinion, therefore, the learned Judge, with respect to him, was clearly in error in not accepting the order *ex facie*, but permit-

ting the petitioner to go behind the order and to allow the petitioner to challenge the order and to call it in question contrary to the provisions of S. 59, sub-cl. (2), Government of India Act.

[2] This appeal has raised a very important question, whatever might be said as to the merits of the order made by Bhagwati J. whether that order is subject to appeal. The order has been made by a learned Judge sitting on the Original Side and the question that falls to be determined is whether this order is a judgment within the meaning of cl. 15, Letters Patent. There is a long and checkered history as to the construction of cl. 15, Letters Patent. But now our High Court has accepted the test applied by the Calcutta High Court, and in order that an order of the Judge should be a judgment within the meaning of cl. 15 it must affect the merits of the question between the parties by determining some right or liability. The Advocate-General has asked us to go a step further and to hold that even though Bhagwati J.'s order may not be a judgment within the meaning of cl. 15, still if the order is wrong and likely to do substantial injustice, we have inherent right to sit in appeal from that order. We are unable to accept that argument. Appeals are creatures of statute and a Court can never have an inherent right to hear an appeal from another Court unless the law so expressly provides, just as a litigant has no right of appeal from a decision which he obtains from one Court to a higher Court unless the law expressly gives him that right. In support of his argument Mr. Amin relied on a decision of this Court in *Jatbhai Cursetji v. Terbai Hormusji*, 55 Bom. 145 : (A. I. R. (18) 1931 Bom. 193). That was a decision of Sir John Beaumont C. J. and Madgavkar J. and in that case the question arose as to who had the right to perform the Navjote ceremony of a minor Parsi girl. The contending parties were the natural father and the maternal grandmother, and Wadia J. on a chamber summons held that the maternal grandmother was entitled to perform the ceremony. When the appeal came before the Division Bench, a point was raised as to whether the appeal was competent, and Sir John Beaumont at p. 148 says that apart from cl. 15, Letters Patent, the Court has inherent jurisdiction to hear an appeal in a matter of that sort affecting a ward of the Court. The learned Chief Justice thought that as the question was of a minor, even though the decision given by Wadia J. in Chambers may not fall under cl. 15, still the Court had an inherent jurisdiction to hear an appeal from that order. With very great respect to the learned Chief Justice, we cannot accept that view of the matter. That decision would be binding on us because it is a decision

of the Divisional Bench, but that decision is clearly explicable on the ground that the order made by Wadia J. finally determined the rights of the minor to have the Navjote ceremony performed by the maternal grandmother and not by the father. On that ground it is difficult to see why the decision of Wadia J. was not a judgment within the meaning of cl. 15. Madgavkar J. also seems to have taken the same view as the view taken by the learned Chief Justice, and he says that the Court can, in its inherent jurisdiction and following the practice on the Original Side, consider the propriety of the order appealed against. With very great respect we do not know of any practice on the Original Side by which appeals are entertained because of any inherent jurisdiction that the Court has independently of cl. 15, Letters Patent.

[3] Then Mr. Amin has relied on a decision of the Privy Council in *Hurrish Chunder Chowdhry v. Kali Sundari Debia*, 10 I. A. 4 : (9 Cal. 482 P. C.). In that case the Privy Council had delivered a certain judgment in an appeal which came before it and the decree was sent down to the trial Court for execution, and under S. 610, corresponding to O. 45, R. 15, a petition was presented to Pontifex J. for execution of the decree passed by the Privy Council, and under sub-cl. (2) of that Order it was the duty of the Court to transmit the order of His Majesty in Council to the Court which passed the first decree appealed from or to such other Court as His Majesty in Council might direct, and the Court to which the order is so transmitted has to execute the decree of the Privy Council. Pontifex J. in that case refused to accede to the petition of the party in whose favour the judgment was delivered by the Privy Council and dismissed his application. The matter went in appeal and the question arose whether the appeal lay. A Full Bench of the Calcutta High Court considered the matter and the learned Chief Justice took the view that Pontifex J. was clearly wrong in not conforming to the mandatory provisions of O. 45, R. 15, but his act was ministerial, and in his opinion no appeal lay as the order that he had passed was not a judgment. The two other Judges took the contrary view. When the matter came before the Privy Council, they held that an appeal did lie. The Privy Council took the view that the decision of Pontifex J. was a judgment within the meaning of cl. 15, Letters Patent, because according to them Pontifex J. had in fact exercised a judicial discretion and had come to a decision of great importance which, if it remained, would entirely conclude any rights of Kali Sundari (who was the party who was affected by the order of Pontifex J.) to an execution in the suit. Then

their Lordships go on to say that in their opinion Pontifex J. could not be said to have usurped the jurisdiction which he did not possess (p. 17):

"... but, if he had, this would have been a valid ground of appeal, and they are unable to agree with the Chief Justice, that if a Judge of the High Court makes an order under a misapprehension to the extent of his jurisdiction, the High Court have no power of appeal, or otherwise, in setting right such a miscarriage of justice."

With very great respect to their Lordships of the Privy Council, this observation must be read, understood and appreciated in its own context. In the case which was before them, there can be no doubt that the judgment of Pontifex J. concluded the rights of parties inasmuch as he dismissed the application for execution. Their Lordships of the Privy Council say that if a Judge misapprehends the extent of his jurisdiction and makes an order, that order would be subject to appeal. But we assume looking to the facts of the case which was before them, that in misapprehending the extent of his jurisdiction the Judge must decide something which concludes the rights of parties. If in misapprehending the extent of his jurisdiction he passes an order which is merely procedural in character or interlocutory, without finally determining the rights of parties, it could not be said that that order would be a judgment within the meaning of Cl. 15, Letters Patent.

[4] The Privy Council case was considered by a Divisional Bench of this Court in *Secretary of State v. Jehangir*, 4 Bom. L. R. 342. In that case Starling J. made an order in a suit, in which the Secretary of State was a party, ordering the Secretary of State to make a further and better affidavit of documents and disclosing certain documents. Now, among the documents which Starling J. had ordered to be disclosed were three documents in respect of which the Secretary of State claimed privilege, and the effect of the order of Starling J. was that not only the Secretary of State had to make an affidavit of documents but he had to disclose them. The Secretary of State appealed and it was contended by the opponent that the order of Starling J. was not appealable as it was not a judgment within the meaning of Cl. 15, Letters Patent, and the Bench consisting of Candy and Chandavarkar JJ. took the view that an appeal lay. Now turning to the judgment of Candy J., it is clear that the view that the learned Judge took was that the effect of Starling J.'s order was to deprive the Secretary of State from claiming the privilege as to the three documents. If Starling J. had stopped at merely ordering an affidavit of documents without compelling the Secretary of State to disclose the documents, the question of privilege would not have been finally determined. But inasmuch

as Starling J. also ordered the disclosure of documents, the point was concluded and the right of the Secretary of State to claim privilege was finally determined, and Candy J. (p. 349) says:

"If Mr. Starling intended that all documents to be disclosed in defendant's affidavit as also all documents mentioned in the list annexed to the written statement must be open to the plaintiff's full and free inspection whether any of such documents are privileged or not and without any opportunity being given to the Court of considering whether such privilege exists or not, then we have no doubt that such an order was passed under a misapprehension of the extent of the Judge's jurisdiction and that we have the power to set it right."

[5] Now, applying this principle, both as laid down in the Privy Council case and as followed in *Secretary of State v. Jehangir*, (4 Bom. L. R. 342), to the facts of this case, there can be no doubt that the learned Judge has misapprehended the extent of his jurisdiction. His misapprehension lies in this that he takes the view that it is open to him to question or challenge the order made by Government and to consider whether it is an order made by the Government of Bombay or not. The next question is whether having misapprehended the extent of his jurisdiction he has made an order which affects the merits of the question between the parties by determining some right or liability. Now, Mr. Rao has contended that the petition is misconceived because he has not made the order, but the Government of Bombay has, and in support of his contention he has put forward the order and he says that on the face of the order it must be decided that it is the Government of Bombay from whom the order has emanated and not from him. The learned Judge in making the order under R. 180 has decided on the merits of this question that it is open to him not to accept the order at its face value. It also determines the rights of the parties because the right of Mr. Rao is to have the petition dismissed against him inasmuch as the petition is not served on the proper party which made the order and he has a right to have that petition dismissed on the strength of the order as it stands and as it is made. The learned Judge has determined his right against him by taking the view that the question whether it was he or the Government that made the order must be determined not by referring to the order itself, not by considering the terms of the order, but *aliunde* by having oral testimony led by Mr. Rao who has authenticated the document. Therefore, without extending the principles which have so far governed our Court in construing Cl. 15, Letters Patent, we are of the opinion that the order made by Bhagwati J. does constitute a judgment within the meaning of that clause and the order is appealable. As we have already said, on merits very little can be said. Section 59 is clear in its terms; its provisions

are mandatory. The Courts are precluded from allowing the orders made by Government to be called in question, and with very great respect the learned Judge has done what the statute say he should not do.

[6] We, therefore, set aside the order made by the learned Judge. The appeal is, therefore, allowed with costs including costs reserved.*

[7] Certificate granted under S. 205, Government of India Act.

G.M.J.

Appeal allowed.

A. I. R. (36) 1949 Bombay 129 [C. N. 39.]
FULL BENCH

CHAGLA C. J., BAVDEKAR AND DIXIT JJ.

Padamsi Premchand and others — Applicants v. Laxman Vishnu Deshpande and others — Opponents.

Civil Revn. Appln. No. 170 of 1948, Decided on 3rd February 1948, from order of Asst. Judge, Thana, in Appeal No. 136 of 1943.

Provincial Insolvency Act (1920), S. 4 — Cases not falling under S. 53 — Insolvency Court has jurisdiction under S. 4 to decide question of title affecting strangers — Transfer by insolvent alleged to be nominal and fictitious — Transaction does not fall under S. 53 — Insolvency Court can under S. 4 decide whether transfer was really fictitious and nominal — If it finds it to be real, it falls under S. 53 and cannot be avoided if it had been entered into beyond period mentioned therein.

Under S. 4 the Insolvency Court has jurisdiction to decide questions of title affecting strangers in cases which are not covered by S. 53. [Para 7]

Nominal and fictitious transfers do not fall under S. 53. Such transfers are void at the inception and are not voidable. Where, therefore, the receiver alleges that certain transfers made by the insolvent beyond two years prior to the date of the insolvency petition were nominal and fictitious, the Insolvency Court has jurisdiction under S. 4 to decide whether the transactions were nominal and fictitious. [Para 6]

If they are found to be real transactions although voluntary, they would then fall within the ambit of S. 53 but having been entered into beyond the period mentioned in S. 53 cannot be avoided by the receiver: A. I. R. (22) 1935 Bom. 316, *Approved*. [Paras 6]

Where the lower Courts have rightly exercised discretion to try the issue the High Court would not interfere with the discretion. [Para 9]

S. A. Desai and A. G. Desai — for Applicants.

S. M. Shah and R. M. Shah — for Opponents.

[*Editorial Note*—Para 4 of the judgment says that the transaction (if held to be real) "not having been challenged within the period required" by S. 53 could not be avoided by the receiver in insolvency. This is a verble inaccuracy. Under S. 53 there is no question of the transaction being "challenged" within any period. The period of two years mentioned in the section relates to the period within which the adjudication as insolvent takes place after the transaction was entered into. So, the date of the insolvency is the material date and not the date on which the receiver challenges the transaction.]

Chagla C. J. — One Keshavji Manckehand was adjudicated an insolvent on a petition pre-

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sented by his creditors on 24th August 1940. Subsequently the receiver in the insolvency filed three applications for setting aside three deeds of transfer dated 25th January 1935, 30th January 1935, and 30th March 1932. These transfer deeds were, one in favour of his son Harkisson-das Keshavji, the second for the education and marriages of his daughters and for the maintenance and residence of the insolvent himself and third again for the benefit of his son Harkisson-das.

[2] In the trial Court an issue was raised whether the Court had jurisdiction on its insolvency side to set aside these deeds of transfer. The learned Judge took the view that S. 53, Insolvency Act, did not apply to the case as the deeds of transfer were made more than two years before the date of the insolvency petition, but he held that the Court had jurisdiction under S. 4 of the Act. An appeal was preferred to the District Court, and the learned Assistant Judge, Thana, dismissed the appeal. In second appeal, on the arguments advanced before me, I felt some doubt as to whether the view taken as to the powers of the insolvency Court by a Division Bench of this Court in *Raoji Pandarkar v. Bawachekar*, 37 Bom. L. R. 478 (A. I. R. (22) 1935 Bom. 316) was the correct view, and on that the matter was referred to a Full Bench and it has now come before us.

[3] Section 53, Insolvency Act, enables the receiver in insolvency to avoid voluntary transfers. If a transfer is made which is not in good faith and not for valuable consideration unless it is made before and in consideration of marriage and if it is made within two years of the presentation of the insolvency petition, then it can be avoided by the receiver in insolvency. It is important to note that the transfers when they were made by the insolvent were valid transfers. Under ordinary law, it is open to a person to make a voluntary transfer. He can make a gift or he can pass a valid title by executing a deed of transfer without taking any consideration for the transfer. But S. 53 provides that these transfers although valid can be challenged at the option of the receiver in insolvency provided the conditions laid down in that section are satisfied, viz., that the transfer must be made within two years of the date of the presentation of the petition. If the transfer was made anterior to that date, then it is not subject to the challenge of the receiver in insolvency.

[4] Mr. Desai for the appellants has contended that these three transfers were executed long before two years of the date of the presentation of the insolvency petition and according to Mr. Desai these transfers fall within the ambit of

S. 53 and therefore it is not open to the receiver in solvency to challenge these transactions in the insolvency Court. The jurisdiction of the insolvency Court to consider question of title is conferred by S. 4 of the Act, which lays down that subject to the provisions of the Act, the Court has full power to decide all questions whether of title or priority or of any nature whatsoever, and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

[5] It is perfectly true that S. 4 is merely declaratory of the jurisdiction of the insolvency Court. It does not declare any substantive law and S. 4, as its very terms indicate, has to be read subject to the other provisions of the Insolvency Act. Therefore, Mr. Desai is right when he says that if a transaction falls within the ambit of S. 53, then it can only be challenged provided the conditions laid down in that section are satisfied. It would then not be open to the Receiver to say that although the transaction falls under S. 53 and he could not challenge it under S. 53 because he could not satisfy the conditions, he would fall back upon S. 4 and invoke the wider jurisdiction conferred by that section. But the question we have to consider is whether all transfers made by an insolvent which are to be challenged necessarily fall under S. 53 of the Act.

[6] In this particular case the Receiver challenged these three deeds of transfer on the ground that they were nominal and fictitious transactions and that they were not intended to transfer the real interest of the insolvent in the properties. Therefore, on the allegation of the Receiver no title passed under these deeds of transfer to the transferee. These transactions were not voidable but they were void. These transactions were not valid in their inception and at no time did they transfer any title to the transferee. In our opinion transactions which are challenged on the ground of their being fictitious or nominal do not fall within the ambit of S. 53. If they do not fall within the ambit of S. 53, then S. 4 is wide enough to confer upon the insolvency Court jurisdiction to decide whether these transactions were in fact nominal or fictitious. Unfortunately the trial Court did not raise the issue in the proper form. The issue it raised was: Has the Court jurisdiction on its insolvency side to set aside the trusts created? If the transaction is fictitious or nominal, it is not necessary to set it aside. It is not necessary to avoid it. It was void *ab initio*

and all that the Receiver in insolvency might want is a mere declaration that in fact those transactions were void and of no effect. Therefore the issue that the trial Court should have considered and should have tried was whether these three transactions challenged by the Receiver were nominal and fictitious as alleged by him. If they were nominal and fictitious, then they did not fall within the ambit of S. 53 and could be declared to be void under S. 4, Insolvency Act. If they were not fictitious and not nominal and they were real transactions although voluntary, then they would fall within the ambit of S. 53 and not having been challenged within the period required by that section could not be avoided by the Receiver in insolvency. The learned District Judge took the right view of the case and held that the trial Court had yet to find whether these transfers were real or fictitious, and it also took the view that if ultimately they were found to be fictitious, then the trial Court had jurisdiction beyond all question.

[7] The position with regard to the law on the subject is this. Under the Provincial Insolvency Act as it was enacted in 1907 there was no section corresponding to S. 4. That section was incorporated in the statute by Act V [5] of 1920. There was a conflict of view between the Allahabad High Court and the Calcutta High Court whether the Court had jurisdiction to adjudicate on titles affecting strangers with regard to transactions which were challenged on the ground that they were fictitious and nominal. The Allahabad High Court took the view that the Court had jurisdiction and the Calcutta High Court took the view that the Court had no jurisdiction: see judgment of Sulaiman J. in *Hari Chand Rai v. Moti Ram*, 48 ALL. 414 at p. 417 : (A. I. R. (13) 1926 ALL. 470). Thereupon the Legislature enacted S. 4, Insolvency Act, and it seems to us that after the enactment of that section there can be no doubt as to the jurisdiction of the Court to decide questions of title affecting strangers in cases which are not covered by S. 53 of the Act. It is also important to note that the language of S. 4 is much wider than the language of S. 7, Presidency-towns Insolvency Act and also S. 105 of the English Act of 1914. Neither the English Act nor the Presidency-towns Insolvency Act refers to title in the corresponding sections. Both these sections deal merely with the question of priority. It is only the Provincial Insolvency Act which in terms confers upon the Court jurisdiction not only to consider questions of priority but also questions of title. This was the view taken by this Court in *Raoji Pandarkar v. Bawachekar*, 37 Bom. L. R. 478 : (A. I. R. (22) 1935 Bom. 316). Murphy

and Barlee JJ. were dealing with a case of a sham and colourable transaction and they held that the Provincial Insolvency Court had jurisdiction to deal with such a transaction under S. 4 irrespective of S. 53, Insolvency Act, and Murphy J. at p. 481 says that there is a consensus of judicial opinion in favour of the view that the Court has jurisdiction to deal with such transactions under S. 4. That was as long ago as 1935, and since 1935, if anything, that consensus has grown against the view put forward by Mr. Desai and in support of the view of this Court.

[8] Our attention has been drawn to the decision of the Allahabad High Court, *Anwar Khan v. Muhammad Khan*, 51 ALL. 550 : (A. I. R. (16) 1929 ALL. 105 F.B.), the decision of the Calcutta High Court in *Shree Shree Radha-Krishna Thakur v. The Official Receiver*, 59 Cal. 1135 : (A. I. R. (19) 1932 Cal. 642) of the Patna High Court in *Biseswar Chaudhuri v. Kanhai Singh*, 11 Pat. 9 : (A. I. R. (19) 1932 Pat. 129) of the Nagpur High Court in *G. N. Godbole v. Mt. Nani Bai*, A. I. R. (25) 1938 Nag 546 : (I. L. R. (1940) Nag. 293) and of the Lahore High Court in *Budha Mal v. Official Receiver*, A. I. R. (17) 1930 Lah. 122 all the High Courts taking the same view as taken by this Court. The only solitary exception, with respect, is the Lucknow Chief Court which takes a contrary view in *Amjad Ali v. Nand Lal Tandon*, A. I. R. (17) 1930 Oudh 314 : (5 Luck. 742). In our opinion, therefore, *Raoji Pandarkar v. Bawa-chekar*, 37 Bom. L. R. 478 : (A. I. R. (22) 1935 Bom. 316) was rightly decided and the Court has jurisdiction to try the question whether these three transfer deeds were fictitious and nominal as alleged by the Receiver.

[9] Mr. Desai has impressed upon us the point of view that a stranger should not be compelled to submit to the jurisdiction of the insolvency Court unless he consents so to do. Section 4 merely confers power upon the Court to decide questions of title affecting strangers. It is left to the discretion of the Court whether it should be done or not. In this case both the lower Courts have exercised the discretion in favour of deciding this question of title in which strangers to the insolvency are interested, and we see no reason why we should interfere with the discretion exercised by the lower Courts, the more so when the allegation of the Receiver is that all these three transfer deeds were intended by the insolvent as a screen against his creditors and nominally he was benefiting not any outsider but his own relations, being his son, wife and daughter. We therefore agree with the learned Assistant Judge that the trial Court should try the issue whether the transfers are real or fictitious. If the trial Court comes to the

conclusion that they are nominal and fictitious as alleged by the Receiver, then it should proceed to give the declaration that the Receiver asked the Court to do. If, on the other hand, the Court comes to the conclusion that the transfers are not nominal or fictitious but they were real transactions although voluntary in their nature then it would be the duty of the Court to decide that they fall under S. 53, and not having been challenged within two years of the date of the presentation of the insolvency petition, the application of the Receiver would fail.

[10] We therefore dismiss the application with costs.

R.G.D.

Revision dismissed.

A. I. R. (36) 1949 Bombay 131 [C. N. 40.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

D. N. Cooper and another—Defendants — Appellants v. Shiavax Cowasji Cambata and another—Plaintiffs—Respondents.

O. C. J. Appeal No. 10 of 1948, Decided on 19th July 1948, from judgment of Desai J.

(a) Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act (VII [7] of 1944), Ss. 9 and 10 — Scope — Sanctity of contracts between landlord and tenant not interfered with by sections — Lease prohibiting subletting without previous consent of landlord—Condition broken by tenant—Tenant not protected under S. 9.

A Court of Law would not permit the sanctity of obligations or of contracts to be interfered with unless the statute in express terms permits a violation of that sanctity. Not only there are no such express terms in S. 10 but in S. 9 the sanctity of contract between the landlord and the tenant is fully respected and given effect to. Hence where a lease provides that the tenant shall not sub-let without the previous consent of the lessor and the tenant sub-lets in breach of the condition of the tenancy the tenant is not protected under S. 9 and is liable to be ejected. [Paras 4 and 8]

(b) Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act (VII [7] of 1944), Ss. 9 and 10 — Scope — S. 10 does not override S. 9 — S. 10 does not deal with contracts between landlord and tenant as regards sub-letting — S. 10 restricts right of sub-letting given by law as laid down in S. 108 (j), T. P. Act — Tenant prohibited by lease deed from sub-letting—S. 9 and not S. 10 applies.

When there are two sections in the statute, the Court must try to reconcile both the sections, unless a subsequent section in terms provides that what is contained in that section is to operate as a proviso to the earlier section or it is to be considered as overriding the provisions of the earlier section.

Section 10 does not state that what is contained in that section is to operate notwithstanding what is contained in S. 9. Therefore, the only way to reconcile S. 9 and S. 10 is to hold that S. 10 does not deal with contracts between the landlord and tenant as regards sub-letting at all. It only deals with the law as it obtains between the landlord and the tenant and provides for a tenant being able to sublet only on certain terms even though those terms may be different from or contrary to the law regulating the relations of landlord and tenant. Section 10 thus restricts the right of the tenant

to sub-let under S. 108 (j), Transfer of Property Act. The expression 'notwithstanding any law to the contrary' cannot be read to mean also notwithstanding any contract to the contrary. Hence, where a tenant is prohibited from sub-letting under the terms of the lease deed, S. 10 does not give him that right. Section 9 applies to such a case. *Observations* in O. C. J. Suit No. 537 of 1944, O. C. J. Suit No. 1983 of 1945 and Civil Revn. Appln. No. 109 of 1946 *held obiter*; O. C. J. Suit No. 965 of 1944, *Disting.* [Paras 4 and 7]

(c) Interpretation of Statutes—Court to carry out object of Legislature if possible—Legislature failing to carry out its object by giving proper expression to it—Court not to violate canons of construction in giving effect to supposed object of Legislature.

Courts must try to help and not deter the Legislature from carrying out its object so long as it is possible to do so. But if the Legislature fails to carry out its object by giving proper expression to it by using adequate language for the purpose, the Court cannot violate the canons of construction merely for the purpose of assisting the Legislature for a supposed object which it might have. [Para 5]

Annotation:—('44-Com.) C. P. C. Pre. N. 7 pt. 11.

M. P. Amin, Acting Advocate-General, M. R. Parpia and S. T. Karani—for Appellants.

M. L. Maneksha and K. J. Khandalavala

—for Respondents.

Chagla C. J.—This is an appeal from the judgment of Desai J., and the question that arises for determination is whether the plaintiffs who are the landlords are entitled to eject their tenants, the defendants. The defendants were the monthly tenants of the plaintiffs and on 23rd July 1947, they sub-let their tenement. The plaintiffs gave a notice to the defendants terminating the tenancy.

[2] The first contention that has been raised by Mr. Parpia on behalf of the tenants is that the notice to terminate was not a valid notice inasmuch as only a month's notice was given, whereas the agreement between the parties required that the notice should be of two months' duration. The agreement between the parties provides that the lessors shall let to the lessees the tenement in question for their use and occupation on a monthly tenancy, and then states the rent which has got to be paid. Clause 9 of the lease provides that either party desiring to terminate the tenancy at or after the expiration of the aforesaid period was to give two months' previous notice ending with the calendar month. Now, it is clear that this particular clause was intended to operate only if the tenancy was for a fixed period. The agreement to lease is in a printed form, and the print with regard to cl. 1 which sets out the period of the tenancy and the rent clearly shows that a tenancy for a fixed period was intended and the blank was to be filled in to show what was the period of the tenancy. As this particular tenancy was a monthly tenancy, the print in cl. 1 is struck off and a typed statement is incorporated which states that the tenancy between the parties is not a ten-

ancy for a fixed period, but a monthly tenancy. It is, therefore, clear that cl. 9 was abrogated as soon as the parties agreed that the tenancy was to be a monthly tenancy. It is impossible to contend that although the tenancy was a monthly tenancy, the notice that was to be given was a notice of two months. The very definition of a monthly tenancy is that it is a tenancy for an indeterminate period which can be determined by a month's notice.

[3] But the more substantial point which has been urged both by Mr. Parpia and by the Advocate-General is whether the tenant continues to be protected under the Bombay Rent Restriction Act, and whether Desai J. was in error when he passed a decree for ejectment against the tenants. One of the terms of the tenancy agreement is that the lessee shall not sub-let or part with the possession of the demised premises or any part thereof to any other party or parties without the previous written consent of the lessors and subject to all the covenants and conditions contained in the agreement. Now, it is not disputed in this case that the tenants have sub-let their premises without the previous written consent of the landlords, and Desai J. held that in doing so the tenants had failed to perform the conditions of their tenancy, and, therefore, they were not protected under S. 9 of Act VII [7] of 1944. As against this, the Advocate-General contends that under S. 10 the tenant is entitled to sub-let, notwithstanding the fact that the tenancy agreement does not permit him to do so without the previous consent of the landlord, and that an additional right is given to the tenant, the exercise of which protects him from ejectment, although in doing so he may commit a breach of the tenancy agreement. Now, S. 10 permits a tenant to sub-let any portion of his premises to a sub-tenant provided he satisfies two conditions: He must forthwith intimate in writing to his landlord the fact of his having so sub-let the premises and also he must inform the landlord as to the rent at which the premises have been sub-let. And this right is given to the tenant notwithstanding anything to the contrary in any law for the time being in force. The law with regard to sub-letting is contained in S. 108, T. P. Act, and that section deals with the rights and liabilities of lessor and lessee and in sub-cl. (j) the lessee is given the right to transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property, and any transferee of such interest or part may again transfer it. Now, it is to be noted that the right given to the lessee under sub-cl. (j) is an unrestricted right. It is not conditioned by either the lessee having to inform the lessor that he has sub-let the

premises or the rent at which he has done so. But the whole of S. 108 is subject to this important proviso that S. 108 only applies provided there is no contract or local usage to the contrary, which means that the law as embodied in S. 108 applies to lessors and lessees unless they choose to make their own law, as it were, and embody it in their own personal contract. If the lessor and lessee choose to make a contract and lay down their rights and obligations, then S. 108 says that the law incorporated in S. 108 shall not apply to the lessor and lessee, but what will apply to them is their own contract and they would be governed by the conditions of that contract.

[4] Now, the Advocate-General urges that S. 10 gives the right to a tenant to sub-let even though in the contract between him and his landlord such a right is not given to him. In other words, according to the Advocate-General S. 10 deals with not only the law as embodied in S. 108 but also with a contract arrived at between the landlord and the tenant. According to him, we must read S. 10 to mean not only 'notwithstanding anything to the contrary in any law for the time being in force' but also 'notwithstanding anything to the contrary in any contract between the parties.' Now, it is a fundamental canon of construction that a Court of Law would not permit the sanctity of obligations or of contracts to be interfered with unless the statute in express terms permits a violation of that sanctity. In the case before us, not only there are no express words in S. 10, but what is important and significant is that in S. 9 the sanctity of contract between the landlord and the tenant is fully respected and given effect to. Because the very basis of the tenant's protection under S. 9 (1) is that he must pay rent to the full extent allowable by the Act and he must perform the other conditions of his tenancy. If one of the conditions of the tenancy is that he shall not sub-let without the previous consent of the landlord, then S. 9 (1) says that the tenant must perform that condition if he wishes to avail himself of the protection given to him under that sub-section. Now, according to the Advocate-General, S. 10 overrides S. 9, and in effect lays down that it is open to the tenant to violate at least one term of his tenancy. The Advocate-General concedes that there is a repugnancy as between S. 9 and S. 10, and he is driven to the position that the only way that repugnancy can be reconciled is by giving to S. 10 the effect of overriding S. 9 at least in one material particular. In our opinion, that is not the proper way to construe Ss. 9 and 10. Again, the ordinary canon of construction is that when there are two sections in the statute, the Court must try and

reconcile both the sections, unless a subsequent section in terms provides that what is contained in that section is to operate as a proviso to the earlier section or it is to be considered as overriding the provisions of the earlier section. Section 10 does not state that what is contained in that section is to operate notwithstanding what is contained in S. 9, and, therefore, the only way to reconcile Ss. 9 and 10 is that S. 10 does not deal with contracts between the parties at all. It only deals with the law as it obtains between the landlord and tenant, and provides for a tenant being able to sub-let only on certain terms even though those terms may be different from or contrary to the law regulating the relations of landlord and tenant. It is not as if S. 10 is wholly redundant. The Advocate-General says that a tenant had already a right to sub-let under S. 108; if that right was merely to be recognised, there was no need to enact S. 10. But S. 10 restricts the right of the tenant to sub-let under the ordinary law. As we have already pointed out, whereas under S. 108 (j) the right of the tenant to sub-let was unrestricted, under S. 10 that right is circumscribed by two conditions: (1) that he must intimate in writing to the landlord the fact of his having sub-let the premises, and (2) he must inform him as to the rent at which the premises have been sub-let.

[5] The history of the legislation with regard to the right of the tenant to sub-let is interesting and throws considerable light on the construction we must put upon S. 10. The Bombay Rent Registration (Restriction?) Order of 1942 was amended by a Notification D/- 13th Sept. 1943, which made a tenant liable to be ejected if he sub-let the premises without the written permission of his landlord after the date of that Notification. Therefore, this Order took away the right of the tenant which he had under the ordinary law of sub-letting without the permission of his landlord in the absence of any contract to the contrary, and it went to the length of penalising such sub-letting by making the tenant liable to be ejected. Then came the Notification dated 6th January 1944, which further amended the Bombay Rent Restriction Order of 1942 and that amendment was practically in the same terms as S. 10 of the Act of 1944, although the Notification of 6th January 1944 did not expressly render the tenant liable to be ejected if he sub-let the premises without intimating in writing to his landlord the fact of his having so sub-let and also the rent at which they were sub-let. Therefore, the law was rendered less drastic as far as the tenant was concerned. He was not compelled to take the permission of his landlord in the case where there was no such term in the

contract between them, but he had to comply with the two conditions to which we have referred. Now, according to the Advocate-General the tendency of the Legislature is to protect the tenant to such an extent that the Legislature intended that he should be given the right to sub-let even though he had no such right under the contract between him and his landlord; and the Advocate-General wants us to construe S. 10 in order to give effect to the tendency of modern legislation which is intended for the protection of tenants. Courts must try and not deter the Legislature from carrying out its object so long as it is possible to do so. But if the Legislature fails to carry out its object by giving proper expression to it by using adequate language for the purpose, the Court cannot violate the canons of construction merely for the purpose of assisting the Legislature for a supposed object which it might have. But in this case, it is not even clear that that is the tendency of modern legislation and the Legislature intended to give the tenants an unrestricted right to sub-let. Because when we come to the latest Act, viz., Act LVII [57] of 1947, we find that S. 15 of that Act contains a complete prohibition against the tenant to sub-let; and S. 13 goes to the length of providing the landlord with an additional ground for ejecting the tenant if the tenant sub-lets his premises. Therefore, if one is entitled to consider the object of the Legislature and the tendency of legislation, the latest Act seems intended to be against the right of the tenant to sub-let, rather than in favour of giving the tenant an unrestricted right to sub-let, even contrary to the provisions contained in the contract between the landlord and the tenant.

[6] Our attention has also been drawn to various judgments of single Judges which have considered this question. Coyajee J. had to consider the construction of S. 10 in *Lazarus Franck v. Solomon A. Zulaikha*, O. C. J. Suit No. 537 of 1944, decided on 18th August 1944, but the views of the learned Judge were obiter because what he ultimately held was that there was a complete assignment of the premises and not sub-letting, and, therefore, S. 10 had no application. The views of Bhagwati J. in *Kaikhushroo Bazonji Kapadia v. Dhanjishaw Hormusji Joshi*, O. C. J. Suit No. 1983 of 1945, decided on 2nd February 1947, on the construction of S. 10 were also obiter. I also happened to have expressed certain views in a case that came before me when I was sitting on the Original Side in *Suleman Haji Ahmed Omer v. J. E. Tattersall*, O. C. J. Suit No. 965 of 1944, decided on 11th October 1944. Mr. Tendolkar (as he then was) argued at the Bar that the tenant was not protected because he had not sub-let a part of the premises

but he had sub-let the whole of the premises and in doing so he had deprived himself of the protection afforded by S. 10 of the Act. I took the view that S. 10 referred to sub-letting not only a part but the whole of the premises. But it must be admitted that it was conceded by Mr. Tendolkar that S. 10 did apply although there was a condition in the lease which required the previous consent of the landlord before the tenant could sub-let the premises, and in coming to the conclusion that the tenant was protected and the plaintiff was not entitled to eject the defendant I took the view that S. 10 gave the protection to the tenant notwithstanding any contract to the contrary. But the point was not argued and, as we have just remarked, my judgment proceeded on the concession made by Mr. Tendolkar.

[7] The same point came for consideration before Weston J., in *Piarelal Talwar v. Pestonji Kooverji Sethna*, Civil Revision Appln. No. 109 of 1946, decided on 26th March 1946. There also the learned Judge's observations were obiter, although Weston J. took the view which we are now taking and which Desai J. in the Court below took that the expression "notwithstanding any law to the contrary" cannot be read to mean also notwithstanding any contract to the contrary.

[8] The result, therefore, is that inasmuch as the tenant has sub-let the premises without the previous consent of the landlord, he is not protected under S. 9. He has not performed one of the conditions of his tenancy. We, therefore, agree with the view taken by Desai J. who passed a decree for ejectment in favour of the plaintiffs. The result, therefore, would be that the appeal fails and must be dismissed with costs.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 134 [C. N. 41.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Kaikhushroo Pirojsha Ghiara—Appellant v. C. P. Syndicate Ltd., and others—Respondents.

Application for leave to appeal to the Federal Court of India: O. C. J. Appeal No. 7 of 1948, Decided on 3rd August 1948.

(a) Civil P. C. (1908), S. 110—"Substantial question of law"—Principles to be applied in granting petition for leave to appeal to Federal Court, stated.

In order to determine if a substantial question of law is involved in a case one or two very fundamental principles have to be borne in mind. The first is that the Court of Appeal in the Province is the final Court; it is the final Court normally and ordinarily. The other principle is that law favours finality in litigation and that it is only in the special circumstances laid down in the Code that a litigant is entitled to travel outside the

Province and go to the highest Court in the realm, which is now the Federal Court. [Para 2]

(b) Civil P. C. (1908), S. 110—"Substantial question of law"—What is—It is not necessarily question of public importance—Application of well-established principle of law to given set of facts would not be substantial question of law—Question of law not well-settled or some doubt as to principle of law involved—It would raise substantial question of law.

It is not at all easy to determine what a substantial question of law contemplated by S. 110 is. A substantial question is not necessarily a question which is of public importance. It must be a substantial question of law as between the parties in the case involved. What is contemplated is not a question of law alone; it must be a substantial question. One can define it negatively. For instance, if there is a well-established principle of law and that principle of law is applied to a given set of facts that would certainly not be a substantial question of law. Where the question of law is not well-settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication, by the highest Court. [Para. 2]

Annotation: ('44-Com.) Civil P. C., S. 110, N. 7.

(c) Civil P. C. (1908), S. 110—Every construction of document does not necessarily involve substantial question of law—In construing document (decree) trial Court and appellate Court coming to same conclusion but by different process of reasoning which is inconsistent or self-destructive—Party can ask to allow matter to be further considered by Federal Court.

The question of the construction of a document is certainly a question of law, but it would be erroneous to contend that every construction of a document necessarily involves a substantial question of law. [Para 3]

Where in construing a document (decree) the trial Court and the appellate Court come to the same conclusion but by different process of reasoning and this process of reasoning is inconsistent or self-destructive, the party can ask the High Court to allow the matter to be further considered by the Federal Court. But not so when these processes of reasoning supplement each other and the result is that the ultimate conclusion at which the Courts arrive is re-inforced by the reasoning which each has advanced in coming to that conclusion. [Para. 3]

The mere fact that the decree was rather of a complicated character which had various provisions in it will not make the construction of the decree a substantial question of law. [Para 3]

Annotation: ('44-Com.) Civil P. C., S. 110 N. 7 pt. 19.

(d) Insolvency—Insolvency notice by creditor against debtor—Nothing should be stated in notice which may act as trap to debtor or put upon him heavier burden.

It is a well-established principle of insolvency law that nothing should be stated by the creditor in the insolvency notice against debtor which might act as a trap to the debtor or which might put upon the debtor a heavier burden than the law requires him to carry. [Para. 4]

(e) Civil P. C. (1908), S. 110—It is for party seeking leave to appeal to satisfy Court of Appeal that substantial question of law arises.

When the trial Court and the Court of Appeal have concurred in their judgment it is for the petitioner to satisfy the Court of Appeal, before which he comes for leave to appeal to the Federal Court, that a substantial

question of law arises which requires further deliberation and adjudication by the highest Court. [Para. 2]

Annotation: ('44-Com.) Civil P. C., S. 110, N. 12 and 16.

H. M. Seervai—for Appellant.

Purshottam Tricumdas—for Respondents.

Chagla C. J.—This is an application by the petitioner for leave to appeal to the Federal Court. An insolvency notice was taken out against the appellant for adjudicating him insolvent and the appellant took out a notice of motion to set aside that insolvency notice. Tendolkar J. dismissed the notice of motion holding that the insolvency notice was a valid notice. From the judgment of Tendolkar J. an appeal was preferred to the Bench consisting of myself and Bhagwati J. and we affirmed the judgment of Tendolkar J. and dismissed the appeal (July 22, 1948). The petitioner seeks to go to the Federal Court on the ground that the question involves a substantial question of law.

[2] Now, in order to determine this question, one or two very fundamental principles have to be borne in mind. The first is that the Court of Appeal in this Province is the final Court; it is the final Court normally and ordinarily. The other principle is that law favours a finality in litigation and that it is only in the special circumstances laid down in the Code that a litigant is entitled to travel outside the Province and go to the highest Court in the realm, which is now the Federal Court. When the trial Court and the Court of Appeal have concurred in their judgment, it is for the petitioner to satisfy the Court of Appeal, before which he comes for leave to appeal to the Federal Court, that a substantial question of law arises which requires further deliberation and adjudication by the highest Court. Frankly, it is not at all easy to determine what a substantial question of law contemplated by S. 110, Civil P. C. is. The only guidance that we have had from the Privy Council is that substantial question is not necessarily a question which is of public importance. It must be a substantial question of law as between the parties in the case involved. But here again it must not be forgotten that what is contemplated is not a question of law alone; it must be a substantial question. One can define it negatively. For instance, if there is a well-established principle of law and that principle of law is applied to a given set of facts, that would certainly not be a substantial question of law. Where the question of law is not well settled or where there is some doubt as to the principle of law involved, it certainly would raise a substantial question of law which would require a final adjudication by the highest Court.

[3] Now, turning to the question involved in this appeal, the first question that had to be

considered both by Tendolkar J. and the Court of Appeal was as to the construction of the decree on which the insolvency notice was based, and the contention put forward by the appellant was that the payment of Rs. 2,50,000 was not an absolute and unqualified obligation to pay, but was conditional upon certain debentures to be transferred by the judgment-creditor. All the three Judges who considered this question came to the conclusion that the contention of the appellant was untenable and could not be accepted. Mr. Seervai has pressed upon us the fact that all the three Judges have come to the same conclusion, but by different process of reasoning. Now, if this process of reasoning was inconsistent or self-destructive, then certainly Mr. Seervai would have been right in asking us to allow the matter to be further considered by the Federal Court. But these processes of reasoning supplement each other and the result is that the ultimate conclusion to which all three Judges arrive is reinforced by the reasoning which each of them has advanced in coming to that conclusion. It is true that the question of the construction of a document is certainly a question of law, but it would be, in our opinion, erroneous to contend that every construction of a document necessarily involves a substantial question of law. This was a decree undoubtedly of a rather complicated character which had various provisions in it. But ultimately what the Courts had to do was to look at the various provisions and to come to the conclusion as to whether the obligation to pay on the part of the judgment-debtor, on which ultimately the insolvency notice was based, was an unqualified obligation or not. We do not think that the construction which the Courts were called upon to place on the decree raises any substantial question of law.

[4] The other substantial question which Mr. Seervai contends arises on the judgment of the Court of Appeal is as to the validity of the insolvency notice. The main argument advanced by the appellant as to why the insolvency notice was not valid was accepted by the Court of Appeal, but that argument became infructuous in view of Ordinance III of 1948 that was passed validating the notice. The other two contentions which were not covered by the Ordinance were held by the Court of Appeal to be a mere surplusage and that conclusion was arrived at by applying to these provisions the well established principles of insolvency law, and the well-established principles of insolvency law are that nothing should be stated in the insolvency notice which might act as a trap to the debtor or which might put upon the debtor a heavier burden than the law requires him to carry. Having accepted

those principles and having applied those principles, the Court came to the conclusion that the two particular provisions in the insolvency notice did not form part of the requirements in the main body of the notice and they could be safely ignored by the insolvent and, therefore, they had no other effect than merely surplusages.

[5] The third possible point of law which according to Mr. Seervai can arise on this judgment is as to the fact that the insolvency notice was taken out by one judgment-creditor although the decree was in favour of four judgment-creditors. Mr. Seervai has relied on certain observations of Bhagwati J. who delivered a separate judgment concurring with the view that I took as to the notice. But I have pointed out in my judgment that there was no substance in this argument, because a joint decree passed in favour of more than one plaintiff can be executed by any of them on behalf of the others, and all that this insolvency notice meant was that the notice was taken out by one judgment-creditor who had that right, as he could have executed the decree on behalf of all the judgment-creditors.

[6] We are most anxious that unnecessary litigation should not be encouraged and there should be some finality to litigation, and, therefore, unless a higher Court takes a different view as to what substantial questions of law really mean under S. 110, we would not like parties to feel that every question of law entitles them not to be content with the view of the final Court in the Province, but to go to a higher Court for a further elucidation on that point. The result is that the petition must fail and must be dismissed with costs.

[7] Mr. Seervai says that he wants to apply to the Federal Court by special leave to appeal, and he wants us to stay further proceedings on the insolvency notice pending the disposal of that application. We will give Mr. Seervai time up to 16th August 1948, to make the necessary application for an interim stay to the Federal Court. If the order is made, then no further question arises. If Mr. Seervai fails to obtain the necessary order from the Federal Court, then further proceedings on the insolvency notice will go on as a matter of course. Mr. Purshotam Tricumdas says that he will not insist upon service for any particular period required by the rules of the Federal Court. He will accept notice whenever served upon him and will be prepared to argue the matter before the Federal Court. Liberty to Mr. Seervai to apply to us on 16th August in case he fails to get the necessary order from the Federal Court.

[8] Mr. Seervai undertakes on behalf of his client not to deal with, dispose of or alienate

any of his properties pending the disposal of the interim application before the Federal Court.

G.M.J.

Petition dismissed.

* A. I. R. (36) 1949 Bombay 137 [C. N. 42.]

FULL BENCH

CHAGLA C. J., BAVDEKAR AND DIXIT JJ.

Sidram Lachmaya—Appellant v. Mallaya Lingaya Chilaka—Respondent.

L. P. A. No. 37 of 1943, Decided on 4th February 1948, from judgment of Sen and Bavdekar JJ.

(a) Civil P. C. (1908), S. 100 — Question of fact—Whether certain person was in possession since certain date is question of fact—Finding cannot be interfered with in second appeal unless there is no evidence for the finding or it is arrived at by error in procedure, even though finding is perverse or Judge sitting in second appeal would himself have arrived at different finding. (Per *Bavdekar J. In Order of Reference.*)

Per *Bavdekar J. (In Order of Reference)*. Whether a certain person was in possession of a whole house ever since a certain date, is a question of fact and unless it can be said that there is no evidence in support of the finding on the question arrived at by the lower Court or that the finding is arrived at by some error of procedure, it cannot be interfered with in second appeal, even if the finding is not such as the Judge sitting singly in second appeal would have arrived at himself or even if the finding is perverse. [Para 2]

Annotation : ('44-Com) Civil P. C., Ss. 100-101, N. 36, 52, 53.

(b) Civil P. C. (1908), S. 100 — Question of law—The question whether possession is adverse is a question of law. (Per *Bavdekar J., in Order of Reference.*) [Para 3]

Annotation : ('44-Com.) C.P.C., Ss. 100-101, N. 36.

(c) Limitation Act (1908), Art. 139 — Suit by landlord upon title against ex-tenant for possession is governed by Art. 139 and not Art. 144 — Question of adverse possession does not arise — Limitation Act (1908), Art. 144. (Per *Full Bench.*) 23 Bom. L. R. 1357 : 98 I. C. 911, OVERRULED.

Per *Full Bench.*—A suit by a landlord against his ex-tenant, based upon title, to recover possession of the demised premises on the expiration of the tenancy is governed by Art. 139 and not Art. 144.

Article 144 is a residuary article, and when there is a specific article dealing with a specific subject, that article is to be applied in preference to a general and residuary article. Therefore, if in a suit for possession it is established that there was a relationship of landlord and tenant between the parties and that relationship has come to an end, then the only article that can apply is Art. 139 and not Art. 144. The point from which limitation begins to run is the determination of the tenancy and once the tenancy is determined, it is immaterial and irrelevant to consider what is the character in which the ex-tenant continues to remain in possession. In such a case the question whether the possession of the tenant is adverse or not does not arise : A. I. R. (9) 1922 P. C. 184 ; 22 Bom. 893 ; 24 Bom. 504 and A. I. R. (14) 1927 Bom. 650, *Foll.* ; 28 Bom. L. R. 1357 : 98 I. C. 911, OVERRULED ; A. I. R. (8) 1921 Bom. 462, *Disting.* ; A. I. R. (21) 1934 P. C. 77, *Expl.* [Paras 9, 18, 21]

Annotation : ('42-Com.) Limitation Act, Art. 139, N. 2, 4, 13 ; Arts. 142 & 144, N. 2 and 59.

T. N. Walawalkar and B. G. Thakar—for Appellant.
K. B. Sukhtankar & M. M. Virkar—for Respondent.

ORDER OF REFERENCE.

Bavdekar J. — This as an appeal under the Letters Patent against the decision of Macklin J. The suit from which the present appeal arises is filed by a person who sold his house in 1923 to the defendant for Rs. 6,000. His case was that the sale was without consideration and therefore void. He, however, failed in it, and the only alternative case upon which he succeeded in the first appellate Court was with regard to his adverse possession from the date of the sale for more than 12 years. This finding of the first appellate Court was composed of two parts, one, that except for a portion of the house which had been given to Kadam during 1924-25 for eleven months, the possession was always with the appellant ever since the date of the sale. The second portion of the finding was that the possession was adverse to the vendee, the defendant. Macklin J. interfered with this finding on two grounds: one, that he himself did not believe the evidence which was adduced by the plaintiff to show that he was in possession of part of the house through two tenants to whom he had let certain portion of the house, and he did not also believe the plaintiff when he said that he himself was in possession of that part of the house which was not in the occupation of the two tenants who had given evidence for him. The plaintiff had besides passed a rent note to the defendant of a portion of the house which expired in 1925. It was contended for the plaintiff that thereafter possession of the plaintiff became adverse to the landlord. Macklin J. found himself unable to accept the position that the portion which was let to the plaintiff in 1925 was the same portion of which he was in possession at the time of the suit. He, therefore, held that the plaintiff had failed to prove his adverse possession of the house for more than 12 years before the suit, and dismissed, therefore, his suit with costs throughout.

[2] Now, in our opinion, in so far as the learned first appellate Judge held that the plaintiff was in possession of the whole house ever since the date of the sale except for the portion which was let to one Kadam during 1924-25 for eleven months was a question of fact, and unless it could be said that there was no evidence in support of the proposition or that the finding is arrived at by some error of procedure it could not be interfered with in second appeal. It is true that the vernacular record of the deposition of the plaintiff does seem to suggest that the plaintiff said that the two persons who were examined as his witnesses were his tenants for two years; but then not only does the statement not find any appearance in the English record, but upon inspection of the vernacular record it

appears to us that the blank space which occurs after '2' may be indicative of a zero having been dropped here by the writer who took down the deposition. In any case, there was obviously evidence in support of the finding of the learned appellate Judge that the plaintiff was in possession of the portion which he claimed he had let to tenants by those tenants, and there was no error of procedure committed by the learned Judge in arriving at the conclusion at which he had arrived. Even if, therefore, the finding was not such as a Judge who is sitting singly in this Court would have arrived at himself, or even if the finding was perverse, there was no jurisdiction to interfere with the finding.

[3] No doubt, the question as to whether the possession which was found was adverse was a question of law; but then leaving aside for the moment the question of the portion in regard to which the plaintiff had executed a rent note, for the rest he was a vendor in possession of the property which he had sold, and again with the exception of the portion which he had taken on a rent note, his possession after the sale would obviously be adverse to the landlord, so that if the finding of the appellate Judge with regard to the plaintiff's possession of this portion has to be accepted, then the finding that the plaintiff had failed to prove his adverse possession for more than twelve years cannot possibly be maintained.

[4] The necessity of this reference to a Full Bench, however, arises in connection with the portion which the plaintiff himself took on a rent note from the defendant. In this rent note the plaintiff stated that the whole house belonged to the defendant; but that statement would, at the most, amount to an acknowledgment of the title of the defendant in respect of the portion not covered by the rent note, and inasmuch as even after the acknowledgment the plaintiff remained in possession of the property for more than twelve years, the possession so far as the portion which he had not taken on rent note was concerned was adverse to the landlord. [His Lordship then came back to the question as to the portion of the house in respect of which he had executed the rent-note which had expired. On this question, his Lordship discussed the decisions as to the Article of the Limitation Act applicable to a suit by an owner of property for possession against his ex-tenant and pointed out the conflict of decisions which made reference to the Full Bench necessary.]

Opinion of the Full Bench

[5] **Chagla C. J.**—Two questions have been referred to this Full Bench by my brothers Sen and Bavdekar JJ., and the two questions are:

(1) Whether the possession of a tenant is adverse to the landlord upon the expiration of the tenancy merely because the tenant has not paid rent?

(2) Whether to a suit based upon title by a landlord against his ex-tenant Art. 139 is the article which applies, or Art. 144?

[6] For the purpose of disposing of these two questions it is sufficient to state just two facts. The plaintiff filed the suit among other reliefs for a relief that he was the owner of the property with which we are concerned in this Full Bench. He was the tenant of the defendant and that tenancy terminated on 11th June 1925, and the suit was filed on 7th July 1938. The plaintiff's contention, with which we are now concerned, was that the title of his landlord had become extinguished under S. 28, Limitation Act, that a new title was created in him and therefore he was entitled to the declaration which he sought in the suit.

[7] The question that arises for determination is which is the article which would govern a suit which the defendant might file against the plaintiff to enforce his right and recover possession, because under S. 28, Limitation Act, at the determination of the period limited by the Limitation Act to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. Therefore, the question is what is the period laid down in the Limitation Act for instituting a suit for possession as far as the defendant is concerned, because it is on the determination of the period that his right to recover the property would be extinguished and on the extinguishment of that right a new title would be created in the plaintiff which he could assert and in respect of which he could obtain a declaration from the Court.

[8] Now, there can be no doubt that on the determination of the tenancy on 11th June 1925, the plaintiff became a tenant at sufferance, if we might make use of an English expression, or a trespasser. Although his possession was originally lawful, and he entered by lawful demise, at the termination of the tenancy his possession became wrongful and he became a trespasser. Therefore on the determination of the tenancy the right would arise in the landlord to recover possession from him of the property and the period of limitation would be governed by Art. 139, Limitation Act.

[9] Mr. Sukthankar for the respondent has contended that it would be open to a landlord to file a suit merely on title and not as a landlord and thereby attract the application of Art. 144. Article 144 is a residuary article, and it is a well-recognised canon of construction of the Limitation Act that when there is a specific article dealing with a specific subject, that article is to be applied in preference to a general and residuary article like Art. 144.

Therefore, if in a suit for possession, it is established that there was a relationship of landlord and tenant between the parties and that relationship has come to an end, then the only article that can apply is Art. 139 and not Art. 144. It will be apparent that if that is the correct position, we would not be strictly concerned with the question whether on the determination of the tenancy the possession of the tenant would become adverse or not. The rival arguments on this point are that as the tenant on the determination of the tenancy becomes a trespasser and his possession becomes wrongful, that possession is adverse against the landlord. On the other hand, the contention is that although the possession of the tenant may be wrongful, it is not necessarily adverse, and a distinction is sought to be drawn between possession which may be wrongful and not yet adverse. In our opinion, it is not necessary to decide that question, because, as I just said, if Art. 139 applies to every case where a landlord sues his tenant, then the question whether the possession of the tenant is adverse or not does not arise. The point from which limitation begins to run is the determination of the tenancy, and once the tenancy is determined, it is immaterial and irrelevant to consider what is the character in which the ex-tenant continues to remain in possession.

[10] Our Court almost consistently has taken the view that in a case by a landlord against a tenant it is Art. 139 that applies. The first case which might be looked at is *Kantheppa v. Sheshappa*, 22 Bom. 893, a decision of Sir Charles Farran, Chief Justice, and Candy J. There at p. 897 Sir Charles Farran says :

"We are inclined to think that the termination of the period of a fixed lease, where nothing further occurs, is the time from which limitation begins to run against the landlord within the meaning of Art. 139, Limitation Act."

[11] The expression "where nothing further occurs" is obviously with reference to S. 116, T. P. Act, because it is open to the landlord on the expiration of the tenancy to accept rent from the tenant or otherwise assent to his continuing in possession and thereby create a fresh lease under the provisions of that section. But if the landlord neither accepts rent nor otherwise assents to the continuing of the possession of the tenant, then it is clear that the tenancy expires, limitation begins to run against the landlord under Art. 139 and his right to obtain possession from his tenant would be barred after the period of 12 years.

[12] Then we come to a decision of Sir Lawrence Jenkins and Candy J., *Chandri v. Daji*, 2 Bom. L. R. 491 : (24 Bom. 504), where the Bench held that where a tenant holds over, he becomes a tenant by sufferance at the deter-

mination of the tenancy, and a suit to evict him must be brought within 12 years of that date and Sir Lawrence Jenkins in his judgment says that Art. 139 deals with those questions where there has been the relationship of landlord and tenant.

[13] Then we come to two judgments of Sir Amberson Marten in *Shravan v. Fattu*, 28 Bom. L. R. 1357 : (98 I. C. 911) and the other in *Purshottam v. Vishnu*, 29 Bom. L. R. 1332 : (A. I. R. (14) 1927 Bom. 650). In *Shravan v. Fattu*, 28 Bom. L. R. 1357 : (98 I. C. 911), the suit was by the son of an ex-tenant who claimed ownership by virtue of adverse possession and Sir Amberson Marten and Percival J. held that on the expiration of the tenancy the possession of the tenant had become wrongful and also that the possession had become adverse within the meaning of Art. 144, Limitation Act, and as 12 years had expired, the plaintiff had acquired a title by adverse possession. With great respect to the learned Chief Justice, we are unable to agree that on the facts of that case it was at all necessary to requisition the assistance of Art. 144. As the relation of landlord and tenant was clearly established, the proper article that applied was Art. 139 and not Art. 144. Of course the Court came to the same conclusion, but we feel, with very great respect, that the decision was not correct in as far as it suggested that Art. 144 might apply even in a case of landlord and tenant. But Sir Amberson Marten, again speaking with very great respect, corrected himself in the following year when he delivered the judgment in *Purshottam v. Vishnu*, 29 Bom. L. R. 1332 : (A. I. R. (14) 1927 Bom. 650) sitting with Crump J. There again it was a case between a landlord and a tenant. Here it was a converse case. It was a suit by a landlord to recover possession of the premises from the tenant and the defendant set up the plea of limitation, and Sir Amberson Marten reviewing all the authorities of this Court came to the conclusion that it was clear that the article that applied was Art. 139, Limitation Act, and as the tenant had continued in possession for more than 12 years after the determination of the tenancy, the plaintiff's suit was barred.

[14] What seems at first blush to be a discordant note has been struck in the decision in *Ichalal v. Nago*, 23 Bom. L. R. 60 : (A. I. R. (8) 1921 Bom. 462). In that case the plaintiff purchased half share in a property from his vendor and then the vendor executed a rent note in respect of that half share. Subsequently the vendor along with the owners of the other half share sold the whole property to the defendant and the plaintiff filed the suit for joint possession against the defendant. The defendant sought

to contend that the plaintiff's suit was barred because limitation began to run on the expiration of the tenancy of the plaintiff's vendor, and as the suit had been filed 12 years after the termination of the tenancy the plaintiff was not entitled to succeed, and Sir Norman Macleod held that the suit was within time since it was governed by Art. 144 and not by Art. 139 and the defendant failed to prove adverse possession. It will be noticed that Sir Norman Macleod expressly states in his judgment that the plaintiff was litigating his right as a tenant-in-common against the defendant who was the successor-in-title of his vendor. What the plaintiff had purchased was a half share in a property and he thereby became a tenant-in-common with the other owners of that property and obviously there can be no limitation against him so long as there was no act of exclusion or ouster against him by his other tenants-in-common. Therefore, this decision on the very special facts on which it was decided does not in our opinion lay down a principle contrary to what has been laid down in the earlier decisions, viz. that in a suit between a landlord and a tenant the proper article that applies is not Art. 144 but Art. 139.

[15] We may also point out that the Privy Council has accepted the Bombay view as to the application of Art. 139 as the correct view. In *Ramanuj v. Ramkrishna*, A. I. R. (9) 1922 P. C. 184 : (74 I. C. 561) a judgment of the Calcutta High Court came before their Lordships and their Lordships in delivering the judgment stated that there was no reason shown why they should disturb the judgment of the High Court, and when we turn to the judgment of the High Court we find that they held that in cases of tenancy by sufferance by a tenant holding over whose lease had expired, Art. 139 applied and the Calcutta High Court referred to the judgment of this Court in *Chandri v. Daji*, 2 Bom. L. R. 491 : (24 Bom. L. R. 504) with approval and it seems that as the Privy Council approved of the judgment of the Calcutta High Court and the reasoning of it, the statement of the law as laid down in the decision of *Chandri v. Daji*, (2 Bom. L. R. 491 : 24 Bom. 504) found favour with their Lordships.

[16] Mr. Sukthankar has relied on another and later decision of the Privy Council in *Allah Rakhi v. Mohammad Abdur Rahim*, 61 I. A. 50 : (A. I. R. (21) 1934 P. C. 77). In that case the sajjadanashin of an ancient wakf sued to recover possession of land from defendants with whose ancestors the land had been settled as mujawars. This was in 1926. It appeared that the sajjadanashin had dismissed the defendants from being mujawars of the shrine in 1898 but they had remained in possession of the land and had con-

tinued to act mujawars. The High Court of Allahabad affirmed the decree for possession taking the view that no question of limitation arose as S. 10, Limitation Act applied. The Privy Council agreed in affirming the decree for possession but on a different ground. Their Lordships held that S. 10 did not apply, but as the defendant had failed to prove adverse possession within Art. 144, the plaintiffs were entitled to possession. What Mr. Sukthankar relies upon is a passage in the judgment of Sir Lancelot Sanderson at p. 58. This is the passage :

"The learned counsel for the appellants referred to Art. 139 as well as Art. 144. It may be noted at once that the appellant's plea of adverse possession is obviously inconsistent with the application of Art. 139, which relates to the case of a landlord suing to recover possession from a tenant."

[17] If one looks to the findings of fact on which their Lordships arrived, this passage becomes clear. Their Lordships held that the defendants continued in possession as mujawars by the leave and license of the plaintiffs and therefore no question of adverse possession arose. The defendants contended that adverse possession commenced from the very moment when they were dismissed and they refused to give up possession. Obviously, therefore, there could be no question of Art. 139 if the defendants relied upon adverse possession from the very first moment of their being in possession after the dismissal, because the very basis of Art. 139 is a relationship of landlord and tenant. It is only after that relationship has come to an end that Art. 139 becomes applicable. But in the case before their Lordships there was no question of the defendants ever having been the tenants of the plaintiff after they ceased to be mujawars and after they were dismissed they were merely holding possession as licensees. In our opinion therefore when there is a case of a tenant lawfully entering into possession and that tenancy terminating and his possession becoming wrongful, in the case where no new tenancy has been effected by the landlord accepting rent or otherwise assenting to the continuance of the tenancy, then if a suit is filed for possession, the only article that can apply is Art. 139 and not Art. 144 and limitation in such a case would begin to run from the date when the tenancy was determined and the limitation would be 12 years under that article.

[18] As we have taken the view that a suit by a landlord against his ex-tenant is always governed by Art. 139 and as we have indicated earlier in the judgment that the question whether his possession is adverse or not does not arise, we answer question No. 2 submitted to us as follows : Art. 139. And with regard to question No. 1 our answer, with respect to the learn-

ed Judges who have referred this question to us, is that on the view we have now taken the question does not arise.

[19] **Baydekar J.** — I would like to add a few words about *Ichalal v. Nago*, 23 Bom. L. R. 60: (A. I. R. (8) 1921 Bom. 462) which has really necessitated this reference, because as indicated by me in the referring judgment, our view was that a suit by a landlord against a tenant, whether it was based upon title or whether it was based upon an allegation that a person whom the landlord had let into possession was bound to restore possession to him, was governed by Art. 139.

[20] The case of *Ichalal v. Nago*, (23 Bom. L. R. 60 : A. I. R. (8) 1921 Bom. 462) referred to a suit filed by a plaintiff who had purchased the interest of two of the co-owners in the property in suit. It appears that when the vendors sold that interest to the plaintiff, they simultaneously executed a rent note in favour of the plaintiff and remained in possession till they sold the property along with the other co-owners to the defendant and even though Sir Norman Macleod said in one part of his judgment that the suit which was filed by the plaintiff was a suit for partition and separate possession of his share against the other co-owners, it was actually a suit for joint possession. This is quite clear from the facts which are set out at the commencement. It is quite clear from the opening paragraph of Sir Norman Macleod's own judgment and it is also quite clear from what Fawcett J. says in his judgment. To a suit by one co-owner against the others for partition and separate possession the article that would apply is Art. 144 and no question could possibly arise with regard to the application of Art. 139. But the suit was for joint possession by a co-owner. The defendant's case was that he was before the Court in two capacities. First of all he was the purchaser of the interest of the other co-owners. To the extent that he was the purchaser of the interest of the other co-owners he had no defence whatever to the suit. As the purchaser of the interest of the other co-owners he had to concede that the plaintiff or his vendor was entitled to joint possession along with him. But the defendant was also the representative of the plaintiff's vendor who became the plaintiff's tenant after the sale and said that the plaintiff lost whatever interest he had inasmuch as the tenancy in favour of the vendors had expired on 22nd August 1904. Subsequently on 5th March 1913, the property was sold by the vendors along with the other co-owners to the defendant and he said that if the suit had been filed for possession by the plaintiff against the vendors, or against a subsequent purchaser from them who

was a stranger, the suit would have been barred under Art. 139 because the suit would be a suit against a tenant or a purchaser from the tenant and the proposition which has now been established is that Art. 139 applies not only to a tenant but also to a person who is representative of the tenant, it may be by purchase, it may be otherwise. Sir Norman Macleod, after mentioning that the suit was a partition suit, went on to observe :

"What might have happened if he had let a portion of the land which belonged to the tenancy-in-common to an outsider who held over is a question which does not arise."

But with respect the question did arise in a suit for joint possession. It was true that in this case the defendant had purchased not only from the plaintiff's landlords but also from the other tenants-in-common the interest of all of them in the suit property. But he may merely have been a purchaser only from the plaintiff's vendors, and if in that case the suit had been filed by the plaintiff against the defendant and the other tenants-in-common, the defendant could obviously have said that, so far as he was concerned, the suit was barred, because the plaintiff had let the property to his vendors after the sale, the vendors remained in possession after the expiration of the tenancy, and he, being a subsequent purchaser from the tenants of the suit property, as representative of the tenant, was entitled to remain in joint possession along with the other tenants-in-common, if the plaintiff's suit was barred under Art. 139. Fawcett J., dealing with this part of the argument said in his judgment (p. 62) :

"In this suit the plaintiff stated his claim to recover joint possession of the plaint property not as a landlord, but as an owner and although he does mention that the land was leased to the defendant's predecessor-in-title, yet his claim was clearly brought on the basis of his title as owner."

[21] The argument was exactly the same as is addressed to us by Mr. Sukthankar that Art. 139 applies only when the suit against the tenant is not based upon title. With that argument we are unable to agree. I therefore concur with the answer proposed by my brother the Chief Justice.

Dixit J. — I agree.

R.G.D.

Answer accordingly.

A. I. R. (36) 1949 Bombay 141 [C. N. 43.]

CHAGLA C. J. AND BHAGWATI J.

The Province of Bombay — Appellant v. Western India Automobile Association — Respondents.

O. C. J. Appeals Nos. 31 and 39 of 1948, Decided on 10th September 1948, from judgment of Coyajee J.

(a) Civil P. C. (1908), S. 96 — Person not party to suit can appeal against order passed in suit, if it adversely affects it, with leave of appellate Court — Government appearing in suit by virtue of notice — Government not joining as party — Order affecting it — It can appeal only with leave of appellate Court — Appellate Court however allowed it to appeal in spite of absence of leave on terms of paying all costs of appeal up to date — Civil P. C. (1908), O. 27A, R. 2.

The Civil P. C., does not in terms lay down as to who can be a party to an appeal. But it is clear, and this fact arises from the very basis of appeals, that only a party against whom a decision is given has a right to prefer an appeal. But it is recognized that a person who is not a party to the suit may prefer an appeal if he is affected by the order of the trial Court, provided he obtains leave from the Court of appeal.

Where the Government of Bombay appears in a suit in pursuance of a notice issued by the Court but does not make itself a party to the suit and is affected by the order passed therein it can appeal against the orders provided it obtains leave of the appellate Court. (But on this technical ground the Bombay Government was not deprived of its right to challenge the order provided it paid all the costs of the appeal up to date.): A. I. R. (21) 1934 Mad. 360, *Ref.*; (1894) 2 Ch. 410, *Rel. on.*

[Paras 3 & 15]

Annotation.—('44-Com.) Civil P. C., S. 96, N. 6.

(b) Industrial Disputes Act (1947), S. 2 (j) — "Industry" — Undertaking and calling referred to need not be carried on for earning profits — Association to render service to members, employing workmen is an industry within meaning of S. 2 (j).

"Undertaking" and "calling" referred to in the definition of "Industry" in S. 2 (j) need not be for the purpose of making profits. These expressions are sufficiently wide to include in them activities not necessarily concerned with the profit motive. What really is emphasised in this sub-section is the relationship of employers and workers. An Automobile Association (Western India Automobile Association) which exists for the purposes of rendering service to its members, without earning any profits and which employs workers, is an "industry" within the definition of the word given in S. 2 (j) and if in this industry a dispute takes place between the employers and the workers, it is a dispute in an industry as contemplated by the Act: 26 C. L. R. 508, *Rel. on.*

[Paras 5, 21 & 23]

(c) Industrial Disputes Act (1947), S. 2 (g) — "Employer" — Definition does not define "employer" generally and for all purposes under Act — It is exhaustive only *qua* industries mentioned in sub-cl. (i) and (ii).

In S. 2 (g) the legislature has not attempted to define the word "employer" generally or for all purposes under the Act. The definition is exhaustive only *qua* the two industries mentioned in sub-cl. (i) and (ii) of S. 2 (g).

[Paras 6 & 19]

(d) Industrial Disputes Act (1947), S. 2 (k) — "Industrial dispute" — Question of reinstatement of dismissed employee constitutes "industrial dispute."

The question of re-instatement of employee is an industry who is alleged to have been wrongly dismissed by the employers is covered by the expression "dispute connected with the non-employment of any person" in the definition of "industrial dispute" in S. 2 (k) and constitutes "industrial dispute."

[Para 7]

(e) Industrial Disputes Act (1947), S. 2 (k) — Industrial Tribunal can order reinstatement of dismissed employee — Award can be enforced by means of

penal provisions — Industrial Disputes Act (1947), Ss. 10, 15, 18 and 29.

Ordinarily there is no such right in any Court of law to compel an employer to engage an employee in whom he has no confidence or whom he does not want to employ for any reason whatsoever. The only right is for the worker to claim damages or compensation. But the whole trend of labour legislation in this country and elsewhere is to interfere with the sanctity of private contract, to protect labour against the free play of contractual rights which may harm him and against which he is not strong enough to protect himself. Therefore, the mere fact that this particular legislation interferes with the rights of contract or the sanctity of a contract cannot be an argument for holding that such an encroachment upon private rights cannot be permitted. What the Courts have to consider is whether the Legislature has chosen to confer upon the Tribunal a right which ordinary civil Courts dealing with ordinary matters between litigants and subjects may not possess.

The Act contains penal provision for the enforcement of the award. If the Tribunal orders an employer to reinstate an employee who has been dismissed, he cannot defy that decision or set it at naught because he would be liable to penalties under the Act if he took the risk of disregarding the decision of the Tribunal.

As far as the Act is concerned, the Tribunal has power to adjudicate upon all matters in dispute between the employer and the worker. Therefore, it is open to the Tribunal to award reinstatement of a dismissed worker, and if such award is made that award would be valid and binding and enforceable by means of the penal provisions in the Act: (1947) 2 All E. R. 693, *Expl. and Disting.*

[Paras 9, 10, 11, 17 & 18]

In Appeal No. 31 of 1948.

M. P. Amin, Advocate-General — for Appellant.
R. J. Kolah, S. D. Vimadlal (for No. 1); *J. A. Shah* (for No. 2); *H. R. Pardiwalla and D. H. Buch* (for Nos. 3 and 4) — for Respondents.

In Appeal No. 39 of 1948.

R. J. Kolah and S. D. Vimadlal — for Appellant.
J. A. Shah — for Respondent.
H. R. Pardiwalla and D. H. Buch — for Applicants.

Chagla C. J. — This is an appeal from a judgment of Coyajee J. ordering the issue of a writ of prohibition against the Industrial Tribunal set up by the Government of Bombay. It seems that a dispute between the Western India Automobile Association and its workers started about November 1946, and on 9th November 1946, the President of the Western India Automobile Association Staff Union served a notice upon the President of the Association setting out various demands of the employees. On 4th December 1946, the President of the Association informed the President of the Union that they were not prepared to recognise the Union or to carry on any correspondence with it. On 30th December 1946, the President of the Union by a letter informed the President of the Association that unless the demands of the workers were accepted, the members of the Union would strike work on 2nd January 1947, and pursuant to this notice there was a strike of the members of the Union starting on 2nd January 1947. On 22nd January 1947, the Association gave notice

to those on strike that unless they resumed their duties by the 27th they would be deemed to be dismissed from the day they went on strike, and on 11th February 1947, the services of those on strike were terminated. On 28th May 1947, the Union made fresh demands upon the Association, and on 11th August 1947, the Government of Bombay issued a notification under S. 7, Industrial Disputes Act, constituting an Industrial Tribunal consisting of Mr. Vyas, and on 17th September 1947, under S. 10 of the Act, the Government referred to the Tribunal for its adjudication the various disputes which were pending between the Association and the Union, and the material one to which I may draw attention was whether such of the members of the Association staff who joined the strike at the date of its commencement on 2nd January 1947, and/or thereafter should be reinstated and paid back wages or salaries with all allowances, bonuses, etc., at the increased rates as may be fixed by the Tribunal, from 2nd January 1947, till the date of reinstatement, and/or such other relief which the Tribunal may grant. I may point out that subsequently in place of Mr. Vyas, Mr. M. C. Shah constituted the Industrial Tribunal.

[2] The Association challenged the jurisdiction of the Tribunal to inquire into this dispute and they filed a petition on 15th November 1947, for a writ of *certiorari*, in the alternative, for a writ of prohibition, and in further alternative, for an order under S. 45, Specific Relief Act, against the Tribunal, preventing it from proceeding with the investigation of this dispute. Before Coyajee J., it was contended by the Association that the Industrial Disputes Act did not apply to the Association at all and therefore the dispute between the Association and its workers could not be referred to the Tribunal. It was also contended by the petitioners that in any event the question of reinstatement of the dismissed employees could not be considered and investigated by the Tribunal. The learned Judge held that the Industrial Disputes Act did apply to the Western India Automobile Association, but he held that it was not competent to the Tribunal to consider the question of the reinstatement of the dismissed employees, and therefore he issued a writ of prohibition against the Tribunal, restraining it from entering upon any inquiry or giving any direction on the question of reinstatement. From this order, an appeal is preferred by the Province of Bombay, and also there is an appeal by the Western India Automobile Association, inasmuch as the learned Judge held that the Tribunal had jurisdiction to investigate the disputes except for the question of reinstatement.

[3] Now, as far as the Province of Bombay

is concerned, it was not a party to the petition, although under the direction of the learned Judge notice was served upon the Province of Bombay, and pursuant to that notice the Province of Bombay appeared before the learned Judge and submitted its point of view before the Court; and a preliminary point is taken that inasmuch as the province of Bombay was not a party to the petition, it is not competent for the Province of Bombay to prefer an appeal from the decision of the learned Judge. The Civil Procedure Code does not in terms lay down as to who can be a party to an appeal. But it is clear, and this fact arises from the very basis of appeals, that only a party against whom a decision is given has a right to prefer an appeal. Even in England the position is the same. But it is recognised that a person who is not a party to the suit may prefer an appeal if he is affected by the order of the trial Court, provided he obtains leave from the Court of Appeal. Therefore, whereas in the case of a party to a suit he has a right of appeal, in the case of a person not a party to the suit who is affected by the order he has no right, but the Court of Appeal may in its discretion allow him to prefer an appeal. It is difficult to understand why the Province of Bombay, which is vitally affected by the decision of Coyajee J., did not think fit to get itself made a party to the petition. Not only it did not do so, but it preferred an appeal without obtaining any leave or any direction from the Court of Appeal, and there can be no doubt that Mr. Vimadalal's contention is sound that as the record stands the appeal preferred by the Province of Bombay is not competent. It is an appeal preferred by a person who was not a party to the proceedings before Coyajee J. and who has not been given any leave by the Court of Appeal to prefer this appeal. It was open to the Province of Bombay to come before us before filing this appeal and get the necessary leave and directions, but that, again, the Province of Bombay did not choose to do. But I do not think it would be right to deprive the Province of Bombay of the right to challenge Coyajee J.'s decision merely on this technical ground. Technicalities should never be permitted to override substantial justice, and we think that the Province of Bombay should be heard provided it pays all the costs of this appeal up to date. We would, therefore, give leave to the Province of Bombay to maintain this appeal although it was not a party to the proceedings before Coyajee J.

[4] Now coming to the merits of the matter, in order to understand the rival contentions of the parties it is necessary to look at the Industrial Disputes Act and to some of its material

provisions. The Act was put on the statute book for the purpose of investigation and settlement of industrial disputes and it provides a machinery for settlement of disputes and differences between the employers and workers. Under S. 7 of the Act, Industrial Tribunals are to be constituted by the appropriate Government. Under S. 10, references of disputes are to be made to these Tribunals. Section 15 lays down the duties of the Tribunals which include the submission of its award to the appropriate Government, and sub-cl. (2) of S. 15 provides that on the receipt of such award, the appropriate Government shall by order in writing declare the award to be binding, and S. 19 provides for the period of operation of the award. Section 29 is the penal section which lays down the penalty for the breach committed by either party of the terms of the award.

[5] Now, the first contention of Mr. Kolah is that the Western India Automobile Association is not an industry at all to which the Industrial Disputes Act can apply. "Industry" is defined by the Act under S. 2, sub-cl. (j), and the definition is :

"Industry means any business, trade, undertaking, manufacture, or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen."

Mr. Kolah says that the Western India Automobile Association does not carry on any business, trade or undertaking with a view to making profits. It is an association whose sole function is to render services to its members and it exists for the purpose of encouraging and developing the automobile movement in Western India. Mr. Kolah contends that it is only when an undertaking is carried on with a view to making profit that it is constituted an industry for the purposes of the Act. I see no reason, looking to the plain words of the section, why such a narrow and restricted meaning should be given to the expression "industry." There is no indication in the section itself that the undertaking referred to in the definition clause must be an undertaking carried on for the purpose of making profit. It may be that as far as a business, trade or manufacture is concerned, every one of those has to be carried on with the profit motive. But as far as an undertaking is concerned, it is something different from business, trade or manufacture, and there is no reason why every undertaking, in order to fall under that sub-clause, must be something done with a view to making profit. The expression "calling" is also sufficiently wide to include in it activities not necessarily concerned with the profit motive. What is really emphasised in this sub-section is the relationship of employers and

workers. If you have an undertaking carried on by employers and workers and if in that undertaking a dispute takes place, then you have a dispute in an industry contemplated by the statute, and it cannot be denied that in this particular case both the employers who are the association and the workers who are the other party to the dispute are engaged in the undertaking known as the Western India Automobile Association which exists for the purpose of rendering services to its members.

[6] It is then argued that the association is not an employer within the meaning of the definition in S. 2, sub-cl. (g), which defines "employers" as :

"Employer means —

(i) in relation to an industry carried on by or under the authority of any department of a Government in British India, the authority prescribed in this behalf, or where no authority is prescribed, the head of the department.

(ii) in relation to an industry carried on by or on behalf of a local authority, the chief executive officer of that authority."

The submission made on behalf of the petitioner is that this is an exhaustive definition, that the Act only applies where the employer is either the Government or the local authority, and as the Western India Automobile Association happens to be neither the Government nor a local authority, the Act does not apply and no Tribunal can be set up to investigate a dispute between the association and its workers. It is perfectly true that a definition may be exhaustive or it may be inclusive. It would depend upon the context which it is. It is also true that ordinarily when the Legislature says that a particular word means something, it intends to convey that that is the only meaning to be given to that expression wherever it appears in the statute. But in this particular case "employer" has a particular meaning, not throughout the context of the statute, not wherever it appears in the statute, but only in relation to the two cases mentioned in sub-cl. (g) (i) and (g) (ii). When the question arises with regard to an industry carried on by Government, then "employer" has a certain meaning given to it by sub-cl. (g) (i). When the industry is carried on by a local authority, then the word "employer" has a certain meaning given to it by sub-cl. (g) (ii). It is exhaustive only qua the two industries mentioned in sub-cl. (g) (i) and (g) (ii). But the Legislature has not attempted to define "employer" generally or for all purposes under the Act. "Employer" is a well known expression which really does not require any definition. But as special cases are contemplated by the statute, the Legislature thought that the word "employer" should be defined with regard to those special cases. The earlier history of this particular legislation also

makes this point perfectly clear. This Act, viz., the Industrial Disputes Act, XIV [14] of 1947, replaced the earlier Act which is Act VII [7] of 1929 known as the Trade Disputes Act, and in the Trade Disputes Act an "employer" was defined as

"Employer, in the case of any industry, business or undertaking carried on by any department of any Government in British India, means the authority prescribed in this behalf or, where no authority is prescribed, the head of the department."

Mr. Kolah states that as far as the Trade Disputes Act, VII [7] of 1929, was concerned, it applied not merely to industries carried on by Government or local authorities, but also to industries carried on by private individuals. But according to Mr. Kolah, there is a vital distinction between the definition of "employer" in Act VII [7] of 1929 and in Act XIV [14] of 1947. I fail to see any such vital distinction. The only distinction is that whereas the Trade Disputes Act defined "employer" with regard to only one class of cases, viz., where the industry was carried on by Government, Act XIV [14] of 1947 defines "employer" with regard to two classes of cases, as I have already pointed out, (i) where the industry is carried on by Government and (ii) where the industry is carried on by a local authority. The exact placing of the word "means" in the earlier Act and in the later Act, to my mind, does not indicate any change in the object of the Legislature in defining the expression "employer". To my mind, it is impossible to contend that whereas Act VII [7] of 1929 applied to all industries, public and private, the new Act XIV [14] of 1947 has suddenly contracted its scope and ambit and is now applicable only to industries carried on by Government and the local authority. One has only to look at some of the provisions of the Act to see how untenable such an interpretation is. For instance, the Act applies to various public utility services and according to Mr. Kolah it is only when the public utility service is carried on by Government or the local authority that the Act would apply and it would not apply if the public utility service was rendered by a limited company or by a private agency. Unless one is driven irresistibly to putting such a construction on the expression "employer," one should be reluctant to do so, as it would indicate a revolutionary change in the policy of the Legislature between the passing of the Trade Disputes Act VII [7] of 1929 and the passing of Act XIV [14] of 1947. There is not a trace of such a change in policy in the actual substantive portions of the two pieces of legislation. Therefore, in my opinion, the learned Judge was right when he came to the conclusion that the definition of "employer" was not exhaustive and that it only referred to the

two classes enumerated in sub-cl. (g) (i) and (g) (ii).

[7] The next question to be considered is whether it is competent to the Tribunal appointed by Government to consider the question of the reinstatement of the dismissed employees of the Western India Automobile Association. In order to answer this question, what we have to consider is whether the question of reinstatement can constitute an industrial dispute between an employer and an employee within the meaning of the Act. "Industrial dispute" has been defined by S. 2, sub-s. (k), and the definition is:

"Industrial dispute means any dispute or difference between employers and employers, or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the conditions of labour, of any person."

Therefore, if there is a dispute or difference between one set of employers and another or between employers and workmen or between workmen themselves, and if such a dispute or difference relates to, (1) employment or non-employment of any person, (2) the terms of employment of any person, or (3) the conditions of labour of any person, then such a dispute or difference may constitute an industrial dispute which can be referred to a Tribunal under the provisions of the Act. Apart from any authority, I should have said that when there is a dispute with regard to the reinstatement of a worker who has been dismissed, it is certainly covered by the expression "dispute connected with the non-employment of any person." The grievance of the workers is that certain persons who were the employees of the Association have not been employed by the Association and they have been wrongly dismissed. Mr. Kolah says that the Legislature has not advisedly used the expression "reinstatement" and therefore the question of reinstatement cannot be referred to the Tribunal. I do not understand why the Legislature should have used such an expression when they have used a much clearer and a much wider expression which would cover cases of reinstatement and which may cover also other cases of non-employment. In this connection it is also pertinent to note the definition of "workman" as it appears in S. 2, sub-cl. (s):

"workman means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, but does not include any person employed in the naval, military or air service of the Crown."

Therefore, a workman who is not actually employed by the employer at the time that the dispute is referred to the Tribunal is included in

the expression "workman" if he was discharged while the dispute was going on, and that is the very case of the workmen here. They were discharged during the dispute between the Association and its workmen, and one of the points of the dispute is the non-employment of those workers who were discharged during the dispute. As I was saying, apart from any authority, on a plain construction of the Act, I should have no hesitation in holding that "industrial dispute" does include a question with regard to the reinstatement of a dismissed employee, and I think Mr. Kolah, also for the petitioner, finds it rather difficult to justify his position on the language of the statute itself. But he takes his stand on a decision of the English Court of Appeal which, according to him, is his sheet-anchor.

[8] Now, let us look at this decision and see whether it is really a sheet-anchor or it merely appears to be an anchor and in reality is anything but that. That is a recent decision reported in *R. v. National Arbitration Tribunal*, 1947-2 ALL E. R. 693. There the Court of appeal was considering the Conditions of Employment and National Arbitration Order, 1940, which was made under Reg. 58AA, Defence (General) Regulations, 1939. By that Order, any trade dispute may be reported to the Minister of Labour and the Tribunal appointed may make an award which was binding on the employer and the workers to whom it related, and it was to be an implied term of the contract between the employers and the workers that the rate of wages to be paid and the conditions of employment to be observed under the contract shall be in accordance with the award. In November 1946, the workmen employed by the Horatio Crowther & Co., Ltd., pressed for changes in wages and conditions of service. On 28th March 1947, the company gave the workmen notice terminating their employment as from 4th April. On 14th April the matter was reported to the Minister of Labour and National Service who referred it to the National Arbitration Tribunal. The claim of the workmen included the reinstatement from the date of dismissal of the workers dismissed, and the award of the Tribunal stated that they were in favour of that particular claim, and the Court of appeal held that the direction to reinstate the workmen was *ultra vires* the Tribunal, and that finding and the award in so far as it related to the reinstatement of the workmen was quashed and the learned Chief Justice Lord Goddard delivering the main judgment has emphasised the fact that under common law it is not open to a Court to pass a decree compelling an employer to engage an employee. If an employer wrongfully dismisses an employee, then the only right of the employee is to claim damages or com-

pensation. No decree for specific performance can be passed with regard to a contract which entails personal services, and the learned Chief Justice says that unless the Legislature expressly confers such a power upon the Tribunal he was not prepared to assume that the Tribunal could compel an employer to keep engaged an employee whose services it had terminated.

[9] Now, Mr. Kolah adopts the same argument and contends that here also it would not be open to the Tribunal to compel the Western India Automobile Association to employ the workmen whom it has dismissed. According to Mr. Kolah, there is no such right in any Court of law to compel an employer to engage an employee in whom it has no confidence or whom he does not want to employ for any reason whatsoever. The only right is for the worker to claim damages or compensation. Mr. Kolah is right that as in England so in India, under the Specific Relief Act no civil Court in this country would ever pass a decree for specific performance at the instance of a worker dismissed by his employer, compelling the master to continue the services of his servant. But it is also to be noted that the whole trend of labour legislation in this country and elsewhere is to interfere with the sanctity of private contract. We are no longer living in those far-off days, which according to some may be halcyon days and according to others wicked and evil days, when the rights of employers and employees were governed purely by contract. The employer went out into the open market, employed whom he liked, paid what he liked, dismissed him when he liked, and the State permitted him to do so. As I was saying, the whole trend of labour legislation is to protect labour against the free play of contractual rights which may harm him and against which he is not strong enough to protect himself. Therefore, the mere fact that this particular legislation interferes with the rights of contract or the sanctity of a contract cannot be an argument for holding that such an encroachment upon private rights cannot be permitted. What we have to consider is whether the Legislature has chosen to confer upon the Tribunal a right which ordinary civil Courts dealing with ordinary matters between litigants and subjects may not possess.

[10] Now, one important fact to bear in mind is the very fundamental difference between the Order which the English Court was considering and our own statute. The efficacy of the award which the Tribunal could make under the Conditions of Employment and National Arbitration Order lay in this that the terms of the award were to be considered as the implied terms of the contract of service. But the award was circumscribed by this that it could only deal with

the rates of wages and the conditions of employment, and after the Tribunal had determined what should be the rates of wages and the conditions of employment, they were imported into the original contract of service between master and servant and the servant could enforce the decision of the Tribunal in a Court of law as if he was suing on the original contract of service. It is also to be noted that, as appears from this decision, there was no means of enforcing the award, no specific means laid down in the English Order itself, and finally the definition of "workman" was very different from the definition that we find in our own statute; there was no reference in the English Order to a workman who had already been discharged. Turning to the judgment of the learned Chief Justice, there can be no doubt that what induced him to come to the conclusion which he did was mainly the circumstance that there was no means of enforcing the award under the English Order, as the learned Chief Justice says at p. 697 :

"If there is and can be no means of enforcing that award, it seems to me a cogent, if not a compelling, reason for saying that the tribunal has no power to award it."

It being the order for reinstatement of the dismissed servants. With respect, the reasoning of the learned Chief Justice is right, because if the award could not be enforced, no ordinary Court of law would ever pass in favour of the dismissed employee a decree for reinstatement, and therefore the award would become really an infructuous decision. But that is not the case here. As I pointed out, our statute contains a penal provision for the enforcement of the award. If the Tribunal orders an employer to reinstate an employee who has been dismissed, he cannot defy that decision or set it at naught because he would be liable to penalties under the Act if he took the risk of disregarding the decision of the Tribunal.

[11] It has been strongly impressed upon us that under the English Order the trade dispute which the Tribunal could investigate was similar to the industrial dispute under our own Act and that the Tribunal in England could also consider the question with regard to the non-employment of a worker. It is therefore urged that Lord Goddard came to the conclusion that notwithstanding the power that the Tribunal had to investigate into the question of non-employment of a worker the Tribunal could not order reinstatement. Similarly, here the Industrial Tribunal could not be given the power to order reinstatement of a worker dismissed by the employer. But what is got to be borne in mind, and to my mind that is the fundamental distinction between the position in England and the position here, is that

under the English Order, as I have already pointed out before, the award that could be made by the Tribunal was a strictly circumscribed award. It was confined to regulating rates of wages and conditions of employment, and the learned Chief Justice in terms in his judgment points out that whereas express power was given to the Tribunal to do what no Court could do, viz., to add to or alter the terms or conditions of contract of service, no such power was given to the Tribunal to reinstate or revive a contract lawfully determined. As far as our statute is concerned, the Tribunal has power to adjudicate upon all matters in dispute between the employer and the worker. Therefore, it is open to the Tribunal to award reinstatement of a dismissed worker, and if such award is made that award would be valid and binding and enforceable by means of the penal provisions in the Act.

[12] I am, therefore, of the opinion that the English decision which is so strongly relied upon is not an authority for the proposition that under no circumstances could an Industrial Tribunal be competent to order reinstatement of a dismissed worker. It is only an authority for the proposition that looking to the special terms of the English Order and the circumscribed nature of the award that the Tribunal could make under that Order, the Tribunal in England was not competent to order reinstatement of a dismissed worker.

[13] I am, therefore, of the opinion that the learned trial Judge was in error when he issued a writ of prohibition upon the Tribunal restraining it from entering upon any inquiry or giving any direction on the question of reinstatement. I would, therefore, allow the appeal preferred by the Province of Bombay, set aside the order of the trial Judge, and dismiss the petition filed by the Western India Automobile Association. The appeal preferred by the Association must fail.

[14] **Bhagwati J.** — These are two appeals from the judgment of **Coyajee J.**, one preferred by the Province of Bombay, being Appeal No. 31 of 1948, and the other preferred by the Western India Automobile Association herein-after referred to as the Association, being Appeal No. 39 of 1948. The Association, in the course of its business or undertaking whatever it may be called, employed workmen, and on 9th November 1946, a letter was addressed to the President of the Association by the President of what was styled Western India Automobile Association Staff Union, presenting before the Association several demands of theirs. It appears that the Association was not in favour of this Staff Union and did not take any cognisance of its status or existence and on 4th December 1946, a

reply was sent by the Association to G. G. Mehta, President of the Union, stating that the committee of the Association was not prepared to enter into any correspondence or discuss with him the matters relating to the Association's staff. A notice of strike was given by the Union on 12th December 1946, whereupon on 27th December 1946, the President of the Association issued a circular letter addressed to the staff intimating what steps had been taken by the Association and its committee for the amelioration of the conditions of the members of the staff and asking them not to take any precipitate action as intimated by the Union. On 30th December 1946, the President of the Union addressed a letter to the President of the Association reiterating the employees' demands and further intimating that if the Association did not comply with the request therein contained the employees would be compelled to strike work and they would make a further demand and be entitled to full wages for the whole of the strike period. Nothing happened thereafter and the strike was commenced by the members of the Union on 2nd January 1947, which resulted in a notice of dismissal being addressed by the Association on 22nd January 1947, to those members of the staff who had commenced the strike. On 28th May 1947, the Union addressed to the Association their fresh demands. On 11th August 1947, a notification was issued by the Government under the Industrial Disputes Act, 1947, constituting an Industrial Tribunal consisting of Mr. D. V. Vyas, I.C.S., for adjudication of industrial disputes in relation to which the Central Government was not the appropriate Government in accordance with the provisions of the Act. On 22nd September 1947, the disputes which had arisen between the Association and the workmen employed by it were referred for adjudication to the Industrial Tribunal under s. 10 of the Act. In this notification over and above the demands which were the subject-matter of the letter dated 9th November 1946, was added a demand for reinstatement and back wages and salaries, which demand arose by reason of the strike situation which had developed since. There was correspondence between the Association and the Industrial Tribunal wherein the Association challenged the jurisdiction of the Industrial Tribunal to act in the matter of the disputes which had arisen between itself and its employees, and the last letter addressed to the Industrial Tribunal was on 14th November 1947, fixing 17th November 1947, as the date when whatever arguments on the points of jurisdiction the Association wanted to urge would be heard by the Tribunal. It was thereupon that the petition was filed by the Association on 15th November

1947. The rule nisi was granted by Desai J. on 17th November 1947, and by the terms of the order Desai J. directed that a notice of the rule nisi should be given by the petitioner to the Province of Bombay and to two employees of the Association on behalf of the employees of the Association. It was in pursuance of this direction that the Province of Bombay as well as the two employees in their representative capacity appeared at the hearing of the petition before Coyajee J.

[14a] In the petition as it was filed the Association contended that the definition of "employer" contained in s. 2 (g) of the Act was exhaustive and did not include the Association. It also contended that it did not carry on any industry but merely gave service to its members and was therefore not amenable to the jurisdiction of the Industrial Tribunal. It lastly contended that demand No. 1, namely, regarding reinstatement and payment of back wages or salary, etc., was not an industrial dispute at all within the meaning of the expression as used in the Act. These were the main points on which the matter was argued before Coyajee J. Coyajee J. held that the Association was an employer within the meaning of s. 2 (g) of the Act, but as regards the demand for reinstatement he, following a decision of the Appeal Court in England reported in *R. v. National Arbitration Tribunal*, 1947-2 ALL E. R. 693, held that it was not an industrial dispute and therefore issued a writ of prohibition against the Industrial Tribunal, respondent 2, prohibiting the Tribunal from entering upon the enquiry into the demand for reinstatement or giving any direction with reference thereto. The Province of Bombay who had appeared before Coyajee J. in accordance with the direction given at the time when the rule nisi was issued by Desai J. filed the Appeal No. 31 of 1948 against this decision of Coyajee J. in relation to the question of reinstatement. The Association filed Appeal No. 39 of 1948 against the decision of Coyajee J. in regard to the question of the Association being an employer within the meaning of the Act. These are the two appeals which have been argued before us.

[15] When Appeal No. 31 of 1948 was called on before us, counsel for the respondent took a preliminary objection that the Province of Bombay not having been a party to the petition it was not competent to the Province of Bombay to file the appeal. It was contended that it was only the parties to the proceedings before the lower Court that had a right of appeal and those persons who were not parties to the proceedings were not competent to file any appeal even though the judgment and the decree appealed from might adversely affect their interests. Our

attention was directed to the relevant provisions of the Civil Procedure Code, namely, ss. 96 and 146 and O. 41, R. 1, Civil P. C. It may be noted, however, that in none of these provisions of the Civil Procedure Code has it been laid down who can prefer an appeal. It was further pointed out that in the commentary of Sir Dinshah Mulla on the Civil Procedure Code and also in a judgment of Mr. Madhavan Nair J. in *Indian Bank Ltd. v. Seth Bansiram Jeshamal Firm*, 57 Mad. 670: (A. I. R. (21) 1934 Mad. 360) it was stated that no person who is not a party to the suit or proceedings has a right of appeal. This is no doubt the position so far as the right of appeal is concerned. A person who is not a party to the suit or proceedings has no right to appeal against the decision and this is the position where a person who is not such party is aggrieved by the decision and wants to appeal against it. He can only ask for leave to appeal from the appellate Court before he can be allowed to file an appeal. There is no right of appeal vested in him by any of the provisions of the Civil Procedure Code or by any other provision of law. The only remedy open to him, if his interests are adversely affected or if he is aggrieved by a decision of the Court, is to approach the appellate Court and ask for leave to appeal which the appellate Court would grant in proper cases. This is the position in England as one finds it laid down in *In re Securities Insurance Company*, (1894) 2 Ch. 410 : (63 L. J. Ch. 777), where Lindley L. J. observed (p. 413) :

"Now, what was the practice of the Court of Chancery before 1862, and what has it been since? I understand the practice to be perfectly well settled that a person who is a party can appeal (of course within the proper time) without any leave, and that a person who without being a party is either bound by the order or is aggrieved by it, or is prejudicially affected by it, cannot appeal without leave. It does not require much to obtain leave. If a person alleging himself to be aggrieved by an order can make out even a *prima facie* case why he should have leave he will get it; but without leave he is not entitled to appeal."

The Province of Bombay had not obtained any such leave to appeal and had filed the appeal as if in exercise of a right to do so. This position was certainly not tenable and under the circumstances of the case we thought it proper to give the Province of Bombay leave to appeal but on terms that the Province of Bombay do pay all the costs up to the time when the leave to appeal was granted by us. This disposed of the preliminary objection which was taken by counsel for the respondent and Appeal No. 31 of 1948 proceeded for hearing.

[16] The point which arises for our determination in this Appeal No. 31 of 1948 is whether the question of reinstatement being demand No. 1, is an industrial dispute within the mean-

ing of the Act. The determination of this question depends on the terms of the Industrial Disputes Act, 1947, the relevant sections of which may be noted in this connection. Section 2, which is the definition clause, defines what is an industrial dispute. Section 2 (k) says:

"'Industrial dispute' means any dispute or difference between employers and employers or between employers and workmen, or between workmen and workmen, which is connected with the employment or non-employment or the terms of employment or with the condition of labour of any person;"

Section 2 (s) defines workman and it says:

"'workman' means any person employed (including an apprentice) in any industry to do any skilled or unskilled manual or clerical work for hire or reward and includes, for the purposes of any proceedings under this Act in relation to an industrial dispute, a workman discharged during that dispute, . . ."

These are the relevant definitions which have to be borne in mind in connection with this point which has been raised before us. The other provisions of the Industrial Disputes Act to which our attention was drawn are S. 10 which provides for reference of disputes, *inter alia*, to the Industrial Court; S. 15, which defines the duties of the Tribunal; S. 18, which sets out the persons on whom the settlements and awards are binding and S. 29 which provides penalty for breach of settlement or award. These provisions will be important when considering whether a demand for reinstatement is an industrial dispute within the meaning of the Act or not.

[17] Turning now to the definitions which have been given of the industrial dispute and the workman, it is clear that any dispute which arises between employers and workmen and which is connected, *inter alia*, with the employment or non-employment of any person would be an industrial dispute within the meaning of that definition, and workman is defined so as also to include a workman discharged during that dispute for the purposes of proceedings under the Act in relation to an industrial dispute. Having regard to the ordinary meaning of the terms "employment" and "non-employment," it follows that a dispute as regards the reinstatement of a workman would be covered either in the term "employment" or "non-employment" according as you look at it from the point of view of the employer or the workman. When the question of reinstatement is raised, the workman insists that he should be employed by the employer in spite of the employer having discharged him from the employment by reason of the industrial dispute itself arising. The employer on the other hand says that he is not going to employ the discharged employee whatever be the reason which led to his discharge. So that, if you look at it from the point of view of the employee who wants to

be reinstated in his employment, it is a question of his non-employment. If you look at it from the point of view of the employer, the employer does not want to employ him; he does not want to reinstate him in the employment and it becomes a question of the employment of the workman by the employer. Having regard to these considerations, it would be a question of either employment or non-employment when the question of reinstatement in employment is raised by the employee who has been discharged by the employer. What is more, this very question has been contemplated by the definition of workman which I noticed above. That definition has been made inclusive of a workman who has been discharged during the industrial dispute for the purpose of proceedings under the Act in relation to an industrial dispute. So that, in so many words, the question of the reinstatement of the discharged workman is contemplated by the Legislature when framing this definition of workman under S. 2 (s) of the Act. If there was nothing more than the two definitions of industrial dispute and workman, that would be enough to dispose of this point and I would hold that the question of reinstatement was an industrial dispute within the meaning of the Act. It was, however, urged very strenuously by counsel for the respondent that the Appeal Court in England has held that reinstatement is not an industrial dispute and particular stress was laid on the observations of Lord Goddard C. J. at p. 696 in *R. v. National Arbitration Tribunal*, (1947) 2 ALL E. R. 693. The question which was there considered was under the Conditions of Employment and National Arbitration Order, 1940. The workmen employed by the applicant company through their union had pressed for changes in wages and conditions of service, and consequent upon that demand the company had given the workmen on the manufacturing side of their business, including those in the union, notice terminating their employment as from a particular date. After the termination of the employment as aforesaid, the matter had been referred to the National Arbitration Tribunal. The claim of the workmen included, *inter alia*, reinstatement from the date of dismissal of the workers dismissed. The award of the Tribunal stated that they found in favour of the claim set out in item (1), that is, reinstatement, and they awarded accordingly. On the applicant company applying for an order of *certiorari* to quash the award, it was held that although at the date of the report to the Minister of Labour the contract of service between the company and the workmen had been terminated, there was nevertheless a "trade dispute", within the meaning of Art. 7 of Order of 1940, which had been properly referred

under Art. 2 (1), a direction to reinstate the workmen would be *ultra vires* the tribunal and as the finding on this item of the claim was equivalent to such a direction, the award in so far as it related to that finding must be quashed. The learned Chief Justice there observed (p. 696):

"There are no express words either in the regulation or in the Order which in terms give the tribunal any power to reinstate, but it is said that as they have power to deal with any question relating to employment or non-employment it follows that they must have the power to make an award of reinstatement. It seems to me a strong thing to say, looking at this regulation which alone gives force to the Order, that a power is thereby impliedly given to the tribunal to grant a remedy which no Court of law or equity has ever considered they had power to grant. If an employer breaks his contract of service with his employees either by not giving notice to which the latter are entitled or by discharging them summarily for a reason which cannot be justified, the workmen's remedy is for damages only. A Court of equity has never granted an injunction compelling an employer to continue a workman in his employment or to oblige a workman to work for an employer. If a workman, or any other employee who occupies a higher status than that usually implied by the term workman, breaks his contract with his employer, no injunction has ever been granted obliging that workman or employee to work for the employer. The most that has ever been done is that, if the contract was one by which for a certain period a person has agreed to serve another exclusively, the workman or employee may be restrained from working for anybody else during the term for which he contractually engaged to serve his employer. Nor is there any provision in the regulation which imposes a penalty on the employer if he refuses after the award to re-employ the man, nor on the workman if, in spite of an award, he refuses to work for an employer. Suppose that after the award the workman sued his employer. He would be met at once by the defence: 'I gave you the notice to which you were entitled, and therefore, you have no remedy against me for breach of contract.' Again, supposing the employers out of deference to the award took the man back into their employment, I cannot find anything in the Order or regulation which would disentitle them to give notice the next day or next week in accordance with the terms of the contract to any individual workman or to all of them. It is true that this tribunal can do what no Court can, namely, add to or alter the terms or conditions of the contract of service. Express power to do so is given by the regulation, while there are no words conferring a power to reinstate or revive a contract lawfully determined."

As I read this judgment of the learned Chief Justice, it proceeds on two grounds: (1) that the freedom of the contract should, in order to be taken away, be taken away by express provisions in that behalf, and (2) that there were no provisions in the Order which would effectuate the direction given in behalf of reinstatement in the award made by the tribunal. So far as the first ground is concerned, no doubt, in the absence of any statutory provision in that behalf, the common law and the freedom of contract which is recognised therein does prevail. One has, however, got to have regard to the express provisions of the statute which may, and in certain cases, do, abrogate this provision of the common law and

substitute special provisions in that behalf. The intention of labour legislation is to restrict this freedom of contract and to enact provisions for the benefit of labour. The freedom of contract has no doubt been considerably curtailed in the enactment before us, and if one finds a definite intention in a statute which has been enacted by the Legislature which goes to show that this freedom of contract which is to be found in the common law is intended to be curtailed in a particular manner, the Court must give effect to those provisions. It is, therefore, necessary to consider how far this freedom of contract is curtailed by the provisions which have been enacted in the Industrial Disputes Act before us. The very definitions of "industrial dispute" and "workman", which I have above referred to and which are contained in S. 2 (k) and (s) of the Act, go to show that employment and non-employment are the subject-matter of the industrial dispute; even a workman who has been discharged is included in the definition of workman. It is clear from the terms of the Act which lay down these definitions of "industrial dispute" and "workman" that the question of reinstatement which can be raised by a discharged workman under these circumstances is a dispute which is connected with the employment or non-employment of the workman and is included within the definition of the "industrial dispute" as enacted in this Act. It is therefore clear that within the very observations of Lord Goddard C. J. the Legislature here has by reason of the enactment of these definitions given power to the Tribunal to do something which no Court could do; an express power is given to the Tribunal to go into and adjudicate upon the question of reinstatement which, without these particular provisions enacted in the Act, the Tribunal would have been unable to do. In my opinion, the power of reinstatement or reviving a contract even though lawfully determined is given to the Industrial Tribunal by the very terms of the Act which I have referred to above.

[18] The second ground on which the learned Lord Goddard C. J., came to the conclusion that there was no such power was that there was no penal clause to be found in the Conditions of Employment and National Arbitration Order, 1940, which would effectuate any such award if made by the Tribunal and that, according to the learned Chief Justice, was a cogent, if not a compelling, reason for saying that the Tribunal has no power to award reinstatement. In the case before us we are not troubled by any such consideration because in S. 19 (2) of the Act we have got specific provision providing a penalty for the breach of any settlement or award made

by the Industrial Court. The settlement or award made by the Industrial Court has got to be submitted by it to the appropriate Government for action under S. 15 (2) of the Act. These settlements and awards are binding, as laid down in S. 18 of the Act, on all parties to the industrial dispute and all other parties summoned to appear in the proceedings as parties to the dispute and other parties referred to in that section. Section 19 lays down the period of the operation of the settlement or award, and S. 29 says that if during the period of the settlement or award any person commits any breach of the settlement or award which is binding upon him, he would be visited with certain penalties prescribed therein. It is this penal clause contained in S. 29 of the Act coupled with the other provisions which I have referred to, which makes the difference to the position here. The position in India is quite different from that which obtained in England and which came to be considered by Lord Goddard C. J. over there. Having regard to the provisions which are contained in the Act before us, there is no doubt that the settlement or award which is given a binding effect can be enforced upon the recalcitrant employer or workman as the case may be and the Industrial Tribunal to whom such industrial dispute has been referred under the Act has got the power, therefore, to go into and adjudicate upon the question of reinstatement of the discharged workmen. The learned Judge below relied upon the observations of Lord Goddard C. J. reported in the case which I have discussed above and came to the conclusion, to which he did, irrespective of the provisions which are contained in the Industrial Disputes Act which I have above referred to. With great respect to the learned Judge, he was in error when he came to the conclusion that the question of reinstatement was not an industrial dispute. I therefore agree with the learned Chief Justice in the conclusion which he has reached that the question of reinstatement was an industrial dispute within the meaning of the Act and the Industrial Court had jurisdiction to entertain the same.

[19] Coming now to Appeal No. 39 of 1948 which has been filed by the Association, two questions have been raised by it in the appeal. One is that the Association is not an employer within the meaning of S. 2 (g) of the Act and therefore there cannot be any industrial dispute within the meaning of the definition thereof in S. 2 (k) of the Act and it was not competent to the Government to refer the alleged industrial dispute to the Industrial Tribunal. It was urged on behalf of the Association that the definition of "employer" contained in S. 2 (g) of the Act is exhaustive, because the words used are "employer means;"

the words are not "employer includes." It was urged that the definition "employer means" is meant to be exhaustive and you cannot travel beyond the definition as given of the word "employer" in the definition clause itself. But if, as is found in other definition clauses, the definition was "employer includes," then the definition would not be exhaustive but merely inclusive and the Association could in that event be included in the definition of employer. In regard to this definition, one has only got to observe that even though the word "means" has been used in this particular definition clause against the employer, it is a special definition of employer which has been given in S. 2 (g) of the Act. The general definition of employer is not touched by it. Generally speaking, a person who employs another is an employer and the person who is employed is the employee, and that general definition is not touched by the special definition which one finds in S. 2 (g) of the Act. If one looks at the various objects for which this Act has been enacted, it contains within its provisions various types of employers, including those who are concerned with public utility services. If the definition of employer which is contained in S. 2 (g) of the Act were read in the restricted sense which is sought to be given to it on behalf of the Association, it would mean that all employers, except the departments of the Government in British India and local authorities, are taken outside the jurisdiction of this Act altogether. There are various industries falling within the definition of industry in S. 2 (j) of the Act which carry on business, trade, undertaking, manufacture or calling mentioned therein, they may be public utility services, such as Posts and Telegraphs services, Education services, sanitation, etc., and in all cases where these industries or public utility services were not carried on by departments of the Government in British India or local authorities, they would not come within the purview of the Act at all. No such consequence could ever have been intended by the Legislature. In so far as the various industries and public utility services may be carried on not only by private individuals or associations of individuals but also by the departments of the Government in British India and by local authorities, it was thought necessary by the Legislature to define what employer means with regard to the departments of the Government in British India and the local authorities where they happen to carry on these industries or public utility services, and it was only in that connection that the special definition of "employer" contained in S. 2 (g) of the Act was given, and this is clear from the wording of the definition, namely, that in relation to an industry carried

on by or under the authority of any department of a Government in British India, employer means the authority prescribed in that behalf, or where no such authority is prescribed, the head of the department; and in relation to an industry carried on by or on behalf of a local authority, it means the chief executive officer of that authority; but that does not mean that in those cases where the industry or public utility service was carried on by any individuals or associations of individuals apart from the departments of the Government in British India or local authorities the word employer does not mean what it indicates, though it may not be comprised within the definition of that word given in S. 2 (g) of the Act. This to my mind is sufficient to dispose of this contention of the Association. It is an employer with regard to the workmen or employees whom it employs in the course of its business or undertaking which it carries on under its memorandum or articles of association and the definition of "employer" given in S. 2 (g) was certainly not meant to apply to it. It is not in fact a department of the Government in British India or a local authority and that definition does not apply to it.

[20] The next contention which was taken up on behalf of the Association was that it was merely a service association catering to the needs of its members, though no doubt in return for a particular fee which every member of the association was to pay to it and was certainly not an industry within the meaning of that term contained in S. 2 (j), namely, any business, trade, undertaking, manufacture or calling of employers, or any calling, service, employment, handicraft or industrial occupation or avocation of workmen. It was urged on its behalf that what it was doing was certainly not any such business trade, undertaking, manufacture, etc., and it was certainly not an undertaking with a view to profit. It was contended that the words business, trade, undertaking or calling should be read *ejusdem generis* and the central idea running through all these items which were included in the definition of industry was that they should be carried on with a view to profit. It was also pointed out that this Association carried on its business or trade, whatever it may be called, not with a view to profit but merely with a view to serve the members. Clause 7 of the memorandum of association definitely laid down as follows:

"If upon the winding-up or dissolution of the Association there remains after the satisfaction of all its debts and liabilities any property whatsoever the same shall not be paid to or distributed amongst the members of the Association but shall be given or transferred to such other institution or institutions having objects similar to the objects of the Association to be deter-

mined by the members of the Association at or before the time of dissolution or in default thereof by the High Court of Bombay and if and so far as effect cannot be given to the aforesaid provision then to some charitable object."

On all these grounds it was urged that the association not being an association carrying on this particular business or undertaking with a view to profit was not included in the definition of "industry" contained in S. 2 (j) of the Act.

[21] Apart from the authority which I will refer to in a moment, even on a reading of the various definitions which are contained in S. 2 of the Act and particularly S. 2 (n), which defines public utility services, it is clear that even though a business, trade, undertaking, manufacture or calling may in some cases result in a profit or be carried on with a view to profit, that certainly is not the central idea running in the definition of industry contained in this Act. Public utility services, which I have enumerated above, may be carried on not only by private individuals or associations of individuals but may also be carried on by departments of the Government in British India or local authorities, and those that are carried on by the departments of Government or local authorities would not necessarily be run with a view to profit. There are various cases in which the public utility services are carried on at nominal charges and the person who receives a benefit of the services may do so at charges which do not appear to be at all in proportion to the value or the utility of the services rendered to him. There are certain public utility services which may be carried on even at a loss by the various bodies concerned. It is, therefore, in my opinion clear that where industry is defined in S. 2 (j) of the Act, it is certainly inclusive of those public utility services which are carried on not necessarily with a view to profit. This circumstance, therefore, can be eliminated from consideration when we consider whether a particular business or undertaking falls within the definition of industry within the meaning of the Act. I am, therefore, of the opinion, that "a view to profit" is not the central idea running in the various items which are mentioned in the definition of "industry" contained in S. 2 (j) of the Act.

[22] I am further fortified in this conclusion of mine by certain observations which are to be found in a case which is decided by the High Court of Australia in *Federated Municipal and Shire Council Employees' Union of Australia v. Melbourne Corporation*, 26 C. L. R. 508. The observations of Isaac and Rich JJ., at p. 554 and pp. 228-233 are very illuminating in understanding the concept of industrial dispute. They are as follows :

"The concept may be thus formulated:—Industrial disputes occur when, in relation to operations in which capital and labour are contributed in co-operation for the satisfaction of human wants or desires, those engaged in co-operation dispute as to the basis to be observed, by the parties engaged, respecting either a share of the produce or any other terms and conditions of their co-operation. This formula excludes the two extreme contentions of the claimant and the respondents respectively. It excludes, for instance, the legal and the medical professions, because they are not carried on in any intelligible sense by the co-operation of capital and labour and do not come within the sphere of industrialism. It includes, where the necessary co-operation exists, disputes between employers and employees, employees and employees, and employers and employers. It implies that 'industry' to lead to an industrial dispute, is not, as the claimant contends, merely industry in the abstract sense as if it alone effected the result, but it must be acting and be considered in association with its co-operator "capital" in some form so that the result is, in a sense, the outcome of their combined efforts. It also implies that 'an industry,' in the relevant sense, is not confined to a single enterprise but means a class of operations in which all persons, employers and employees, are engaged on the same field of industry—not necessarily of commerce—provided by the society in which they exist."

I also cannot resist the temptation of quoting from the observations of Powers J. at p. 590 which are as follows :

"It is admitted the 'quarrying' (a necessary work in connection with street making) by a private employer would be 'industrial' and that an industrial dispute could arise between him and his employees engaged at work in a quarry ; but it was asserted that if a municipal corporation acquired the quarry and employed the same men, no industrial dispute could arise, because the Council was not carrying on 'an industry' or a trade or business for profit. So far as the question in this case is concerned as the argument proceeded the ground mostly relied upon (after the Councils were held not to be exempt as State instrumentalities) was that the work was not carried on by the municipal corporation for profit in the ordinary sense of the term, although it would generally speaking be carried on by the Councils themselves to save contractors' profits. If that argument were sufficient then a philanthropist who acquired a clothing factory and employed the same employees as the previous owner had employed would not be engaged in an occupation about which an industrial dispute could arise, if he distributed the clothes made to the poor free of charge or even if he distributed them to the poor at the bare cost of production. If the contention of the respondents is correct, a private company carrying on a ferry would be engaged on an industrial occupation. If a municipality carried it on, it would not be industrial. The same argument would apply to baths, bridge building, quarries, sanitary contracts, gas-making for lighting street and public halls, municipal buildings or houses or halls, and many other similar industrial undertakings. Even coal-mining for use on municipal railways or tramways would not be industrial work if the contention of the respondents is correct. If the works in question are carried out by contractors or by private individuals it is said to be industrial, but not industrial within the meaning of the Arbitration Act or Constitution if carried out by municipal corporations, I cannot accept that view."

[23] I also agree with this particular point of view that in order to constitute an industry

within the meaning of that term as defined in S. 2(j) of the Act it is not necessary that the business, trade, undertaking, manufacture or calling should be carried on with a view to profit. If that is so, the Association which carries on this undertaking under the terms of its memorandum and articles of association and renders services to its members can nonetheless be an industry within the definition of that term contained in S. 2(j) of the Act, the undertaking is carried on by it as employers who employ workmen, and therefore if differences arise by reason of certain disputes which may arise in connection with the employment or non-employment or the terms of employment or with the conditions of labour, an industrial dispute arises between it and the workmen employed by it, which would be the subject-matter of reference to the Industrial Tribunal under the terms of the Act. This contention of the Association also, therefore, fails.

[24] In the result I agree that the appeal of the Province of Bombay should be allowed and the appeal of the Association should be dismissed.

[25] **Per Curiam.**—We think the fairest order with regard to costs would be, in the first instance, to set aside the order of costs of the trial Judge and in Appeal No. 31 of 1948 the order of costs will be that the Western India Automobile Association, respondent 1, should pay the costs of the appeal including costs reserved, of the Province of Bombay. There will be no order as to costs in respect of respondents 2, 3 and 4.

[26] With regard to Appeal No. 39 of 1948, the appellant will pay the costs of the respondents, the Industrial Tribunal. As regards the costs of the petition, the Western India Automobile Association will pay the costs of the petition to the respondents, the Industrial Tribunal and also the costs of the Province of Bombay and of the workers—the costs of the Province of Bombay and workers to be in one set.

R.G.D.

Orders accordingly.

A. I. R. (36) 1949 Bombay 154 [C. N. 44.]

CHAGLA C. J. AND BHAGWATI J.

Abraham Ezra Issac Mansoor—Defendant—Appellant v. Abdul Mahomed Alibhai—Plaintiff—Respondent.

O. C. J. Appeal No. 8 of 1948, Decided on 30th August 1948, from judgment of Tendolkar J., D/- 15th December 1947.

(a) Transfer of Property Act (1882), Ss. 55 (2) and 60—Agreement for sale as mortgagee under power of sale reserved—Agreement for making out marketable title also—Agreement is not absolute but conditional on mortgagor not exercising his right of redemption—Marketable title meant right, title and interest of mortgagee and equity of redemption of mortgagor—There was contract to contrary and hence S. 55 (2) not applicable.

An agreement for sale of certain property stated that the vendor was in possession of the property as mortgagee and had agreed to sell the property as such mortgagee under the power of sale reserved to him under the indenture of mortgage and that the vendor alone would execute the conveyance on completion. The agreement further provided that the vendor shall make out a marketable title to the property and if the title be not proved marketable the vendor would pay back the earnest money with interest and costs incurred. On redemption of the property by the mortgagor, the mortgagee informed the vendee that he was not in a position to complete the contract and returned the earnest money. In a suit by the vendee for damages for breach of the contract:

Held, that (1) an agreement for sale by a mortgagee with a purchaser does not extinguish the equity of redemption vested in the mortgagor. The agreement by the vendor to sell the property was only a conditional one and not an absolute one. The agreement was conditional on the mortgagor not redeeming the property as he was entitled to do under S. 60: A. I. R. (31) 1944 Bom. 156, *Rel. on*; [Para 3]

(2) the marketable title contemplated by the agreement was the right title and interest of the mortgagee himself and the equity of redemption of the mortgagor which the mortgagee was entitled to convey as the agent of the mortgagor. The provision did not mean that the vendor had covenanted to make out a title independently of the mortgagor's right to redeem or that he had agreed in making out a marketable title that the mortgagor had no right to redeem the property; [Para 4]

(3) assuming that covenant for title under S. 55 (2) operated at the stage of agreement for sale there was no guarantee of absolute title under the agreement. On the contrary, there was a contract to the contrary by which the vendor made it clear to the purchaser that he would only be able to convey the property to the purchaser provided the mortgagor did not exercise his right to redeem the property and therefore S. 55 (2) did not come into operation; [Para 5]

(4) hence the vendor was not liable for damages. The only right that the purchaser had under the agreement was to the return of the earnest money with interest and costs. [Para 6]

Annotation : ('45-Com.) T. P. Act, S. 55 N. 9; S. 60 N. 22 Pt. 7a.

(b) Contract Act (1872), S. 73—Whether rule in (1873) L. R. 7 H. L. 158 inapplicable in India (*Quaere*).

(*Quaere*)—Whether rule in (1873) L. R. 7 H. L. 158 is contrary to the provisions of S. 73 and is inapplicable in India. [Para 12]

Purshottam Tricumdas and S. A. Desai—

for Appellant.

A. A. Peerbhoy and S. T. Desai— for Respondent.

Chagla C. J.—This is an appeal from a judgment of Tendolkar J. It seems that on 9th February 1943, the plaintiff and the defendant entered into an agreement whereby the defendant agreed to sell to the plaintiff an immoveable property for the price of Rs. 48,000. The amount of earnest money of Rs. 3,000 had already been paid by the plaintiff to the defendant on 18th January 1943. The defendant was the mortgagee of this property and the mortgagor filed a suit to redeem the property and after some contest a redemption decree was passed in

favour of the mortgagor, and as the mortgagor redeemed the property, the defendant informed the plaintiff that he was not in a position to complete the contract and convey the property. He sent a cheque for Rs. 3,000 returning the earnest money which had been deposited with him by the plaintiff. The plaintiff, in the first instance, refused to accept the cheque of Rs. 3,000 and claimed damages for breach of contract. Ultimately he accepted the cheque of Rs. 3,000 without prejudice to his claims and contentions, and filed this suit claiming in the first instance a sum of Rs. 80 being interest on the sum of Rs. 3,000 at 6 per cent. per annum from 9th February 1943 to 22nd July 1943, and a sum of Rs. 748-11-6 which were the costs incurred by the plaintiff of and incidental to the agreement for sale, and damages in the sum of Rs. 12,000 or such other sum as the Court may award for breach of contract by the defendant. The learned Judge took the view that the contract between the parties was an absolute one. He then considered whether the rule of *Bain v. Fothergill*, (1873) L. R. 7 H. L. 158; (43 L. J. Ex. 243) and *Flureau v. Thornhill*, (1776) 2 Wm. Bl. 1078 applied in India, and came to the conclusion that that rule did not apply, that the parties were governed by the plain words of s. 73, Indian Contract Act, and that the defendant was liable to pay damages for the breach of contract. He fixed the date of breach and referred the suit to the Commissioner to ascertain damages on the footing of a breach on that date. The defendant has come in appeal from that decision.

[2] Now, it is unnecessary, in my opinion, to express any opinion on the very interesting question raised by the learned trial Judge as to whether the well known English rule in *Bain v. Fothergill*, (1873 L. R. 7 H. L. 158 and *Flureau v. Thornhill*, (1776) 2 Wm. Bl. 1078), applies or does not apply in India. As the learned Judge has himself pointed out, there are conflicting decisions of our own Court. There are also decisions of other High Courts to be considered before one can express one's opinion one way or the other. But as this appeal is capable of being disposed of on a much narrower point, it is not at all desirable to launch upon the more ambitious question of the applicability of the rule in *Bain v. Fothergill*: (1873) L. R. 7 H. L. 158 and *Flureau v. Thornhill*: (1776) 2 Wm. Bl. 1078 to this country. Therefore that question must still remain undetermined till a proper occasion arises when the whole matter may be considered from all aspects.

[3] Now turning to the agreement for sale, in cl. 2 of the agreement, it is stated that the vendor is in possession of the property as mortgagee from one Abdul Latiff and has agreed to sell

the property as such mortgagee under the power of sale reserved to him under the indenture of mortgage dated 7th February 1936. The vendor alone will execute the conveyance on completion. Then cl. 5 contains the usual provision that the vendor shall make out a marketable title to the said land, hereditaments and premises agreed to be sold. And cl. 7 of the agreement provides that if the title be not proved marketable, the vendor will pay back the earnest money with interest at 6 per cent per annum from 18th January 1943, and pay costs incurred up to date. It is, therefore, clear from this agreement that the vendor was entering into an agreement for sale of a property of which he was the mortgagee. It is also clear in law that the mortgagor has the right to redeem a property which he has mortgaged till the equity of redemption has been extinguished, and it is now also clear law, as laid down in *Abraham Ezra v. Abdul Latif*, 46 Bom. L. R. 159; (A. I. R. (31) 1944 Bom. 156), that an agreement for sale by the mortgagee with a purchaser does not extinguish the equity of redemption vested in the mortgagor. Therefore, in my opinion, this agreement by the vendor to sell the property was not an absolute agreement, but a conditional one. What the vendor agreed with the purchaser was that he would sell the property, convey the property, make out a marketable title, provided the mortgagor did not redeem the property as he was entitled to do under s. 60, Transfer of Property Act, 1882. Mr. Peerbhoy says that that is not what the vendor has stated in the agreement. In my opinion, nothing could have been more clearly and emphatically stated than that by reason of cl. 2 of the agreement. Clause 2 does state the fact that the vendor is selling the property as a mortgagee under the power of sale reserved to him under the indenture of mortgage. It is not necessary in an agreement for sale to set out the law, and once the vendor has stated that he is selling as a mortgagee, s. 60, T. P. Act, makes it clear that his right to sell is dependent upon and conditional upon the mortgagor not redeeming the property, and s. 60 also makes it clear that the right of the mortgagor to redeem continues and subsists till the equity of redemption is extinguished. Therefore, with very great respect to the learned Judge, I do not agree that this agreement was an absolute agreement of sale and not a conditional one.

[4] The learned Judge has relied on cl. 5 of the agreement which states that the vendor shall make out a marketable title. The marketable title contemplated by this clause clearly is the right, title and interest of the mortgagee himself and the equity of redemption of the mortgagor which the mortgagee is entitled to convey

as the agent of the mortgagor. The vendor would have to satisfy the purchaser that he as the mortgagee is entitled to convey the property and that the mortgagor also had title to the property being the owner of the equity of redemption. But this clause does not mean that the vendor had covenanted to make out a title independently of the mortgagor's right to redeem or that he had agreed in making out a marketable title that the mortgagor had no right to redeem this property.

[5] The learned Judge also relied on S. 55 (2), T. P. Act. Now that corresponds to what is known in English law as a covenant for title. In England there is no statutory guarantee of good title. Our law makes a departure from the English law and provides for a statutory guarantee of good title in the absence of any contract to the contrary arrived at between the parties to the agreement themselves. There is some conflict between the different High Courts as to whether this covenant for title operates at the stage of agreement for sale or at the stage of the execution of the conveyance. But without going into that question, I will assume that even in an agreement for sale the vendor guarantees good title to the purchaser. In other words, he guarantees to the purchaser that he has title in the property and that he is in a position to convey the property. If there is no contract to the contrary Mr. Peerbhoy is right that the guarantee or the covenant for title under S. 55 (2) would be absolute and it would not be a title defeasible at the instance of any other party. But looking to cl. 2 of the agreement, in my opinion, there is a contract to the contrary between the parties and therefore S. 55 (2), T. P. Act, does not come into operation. There is no guarantee of absolute title under this agreement, nor does the vendor covenant with the purchaser that he is in a position absolutely to transfer the property to him when the sale is completed. On the contrary, there is a clear contract to the contrary by which the vendor makes it clear to the purchaser that he would only be able to convey this property to the purchaser provided the mortgagor does not exercise his right to redeem the property.

[6] Under the circumstances, in my opinion, the learned Judge was in error when he came to the conclusion that the defendant was liable to pay damages for breach of contract. The only right that the plaintiff has under the agreement is to the return of the earnest money with interest at 6 per cent. per annum from 18th January 1943. The defendant has repaid the sum of Rs. 3,000 and all that the plaintiff would be entitled to would be a sum of Rs. 80 for interest which he has claimed in the suit. He

has also claimed a sum of Rs. 748-11-6 for costs which he would be entitled to. Mr. Purshottam says that he is prepared to accept the figure of Rs. 748-11-6 as correct. Therefore, the amount which the plaintiff would be entitled to in the suit would be the sum of Rs. 828-11-6.

[7] Therefore, we will allow the appeal, set aside the order of the trial Court, and pass a decree in favour of the plaintiff for Rs. 828-11-6. With regard to costs as the claim is below Rs. 1,000 there will be no order as to costs of the suit. As the defendant has succeeded in appeal, the respondent must pay to the appellant the costs of the appeal and interest on judgment at 4 per cent. The appellant is entitled to set off the order of costs in his favour here and also two orders for costs in the Court below against the decree which we are passing in favour of the plaintiff here.

[8] **Bhagwati J.** — The defendant was the mortgagee under an indenture of mortgage dated 7th February 1936. The mortgagor committed default and in exercise of the power reserved to him under the indenture he agreed on 9th February 1943, to sell the mortgaged property to the plaintiff. An agreement for sale was executed on the said date, cl. 2 whereof provided that the "vendor is in possession of the property as mortgagee from one Abdul Latif and has agreed to sell the property as such mortgagee under the power of sale reserved to him under the indenture of mortgage dated 7th February 1936. The vendor alone will execute the conveyance on completion."

Under the terms of the said agreement the defendant also agreed to make out a marketable title to the said property, and if the title be not proved marketable, to pay back the earnest money with interest at 6 per cent. per annum from 18th January 1943, and pay the costs incurred up to date. It appears that before the sale could be completed in accordance with the terms of this agreement the mortgagor desired to redeem the property. As he was then advised, the mortgagee resisted this claim of the mortgagor and litigation thereupon took place between the mortgagor and the mortgagee. A suit was filed by the mortgagor to redeem the mortgaged property. This suit came before Chagla J. as he then was and he decided that the mortgagor was entitled to redeem the property, the equity of redemption not having been extinguished before the sale was completed by the mortgagee. The mortgagee filed an appeal against this decision and the decision of the appeal Court is reported in *Abraham Ezra v. Abdul Latif*, 46 Bom. L R 159: (A. I. R. (31) 1944 Bom. 156). The appeal Court confirmed the decision of Chagla J. and held that the mortgagor was right up to the last moment, viz., the completion of the sale by the mortgagee, entitled to redeem the mortgaged

property. This decision having been finally reached by the appeal Court, the position which arose was that the defendant was not in a position to complete the sale in accordance with the terms of the agreement between himself and the plaintiff and he returned the earnest money of Rs. 3000 to the plaintiff. The only claim then which survived was the plaintiff's claim for damages as on a breach of the contract, Rs. 80 being the amount of interest which had not been paid by the defendant to the plaintiff and the costs of the sale. This was the claim which the plaintiff filed against the defendant in the suit which was tried by the learned trial Judge. I shall not recount here the pleadings or the amendments which were made in the plaint at the instance of the plaintiff, because so far as the amended plaint was concerned the contentions which were raised by the amendment were given up by the plaintiff at the hearing of the suit. In so far, however, as the original plaint stood, certain issues were raised, Issue No. 8 being whether the contract was a conditional one and liable at any time before the completion of the said sale to be set aside by the mortgagor coming in and redeeming the property. On this issue, the learned Judge held that the contract was not conditional but was an absolute one, the vendor in his opinion having agreed to convey the property to the plaintiff absolutely and having taken the risk himself of having to pay damages to the plaintiff if the mortgagor intervened and redeemed the property before the sale was completed. The learned Judge also decided another important question whether the rule in *Barn v. Fothergill*, (1873) L. R. 7 H. L. 158 was inconsistent with the plain terms of S. 73, Contract Act, and was therefore not applicable in India, on the question of damages which were claimed by the plaintiff against the defendant on a breach of the agreement for sale.

[9] Adverting to the first question which was decided by the learned Judge, as to whether the contract was conditional or absolute, it is necessary to determine what is the nature of the agreement for sale which is entered into by a mortgagee exercising his power of sale. Under the terms of an indenture of mortgage like the one which the mortgagor had entered into here, the power of sale was reserved to the mortgagee in the event of the mortgagor committing default. The mortgagee was in exercise of that power of sale entering into an agreement for the sale of the property, which would mean not only his right, title and interest therein as the mortgagee, but also the equity of redemption which had vested in the mortgagor. Until that equity of redemption was extinguished either by act of parties or by a decree of a Court, it was open to

the mortgagor to redeem the property by exercising the right of redemption. But until that was done, the mortgagee had, by reason of the power of sale reserved to him under the terms of the indenture, power to convey the property including the equity of redemption which was still subsisting in the mortgagor. This is what the mortgagee would in ordinary cases do. That was the position which was quite clear to both the parties to the agreement for sale before us, and in cl. 2 of the agreement which I have set out above the mortgagee clearly stated that he was entering into the agreement for sale of the property in exercise of the power of sale which was reserved to him under the terms of the indenture. There could be no clearer notice to the purchaser than this that what the mortgagee was doing was agreeing to sell and convey the property to the purchaser, which right of his was subject to the terms of S. 60, T. P. Act, which clearly laid down that the mortgagor had, until extinguished by act of parties or by a decree of a Court, the right to redeem the property. If this was so, it could not be argued at all that the mortgagee when he entered into the agreement for sale entered into the same, absolutely agreeing to convey the property to the purchaser, whatever the action or the conduct of the mortgagor was in the future. The mortgagor having the right to redeem up to the time that the equity of redemption was extinguished, would be able to redeem the property, and until and unless the sale was completed by the mortgagee in accordance with the terms of the agreement for sale, the mortgagor's equity of redemption would not be extinguished and the purchaser under the terms of the agreement would not be entitled to insist on the mortgagee conveying the property to him irrespective of the future conduct of the mortgagor. In this case the mortgagor, before the sale was completed, did seek to exercise his right to redeem the property, with the result that it became impossible for the mortgagee to convey the property in the manner in which he had agreed to do. Under the circumstances, there is no doubt in my mind that having regard to the fact that the mortgagee was exercising the power of sale reserved to him under the terms of the indenture, there was a condition that the mortgagee was to convey the property provided the mortgagor did not exercise his right to redeem the property within the terms of S. 60, T. P. Act. That was in any event a contract to the contrary which is referred to in the opening part of S. 55, T. P. Act, apart however from the discussion as to whether the covenant for good title contained in S. 55 (2), T. P. Act, operates when the contract is at the stage of a contract or when the contract is com-

pleted by the execution of a conveyance by the vendor in favour of the purchaser in accordance with the terms thereof.

[10] The learned Judge in the course of his judgment laid particular stress on the terms of cl. 5 of the agreement which provided that the vendor was to make out a marketable title, observing that the making out of a marketable title clearly involved not only a title to the property but also a power to transfer it at the time of the conveyance. There is no doubt that the vendor agreed to make out a marketable title to the property. The marketable title, however, in the circumstances of the case, would mean the right, title and interest which the mortgagor had at the time when he executed the indenture of mortgage in favour of the mortgagee and the right, title and interest which the mortgagee himself had under the terms of the indenture of mortgage. The equity of redemption and the mortgagee's rights are the only two things which would have to be considered when the marketable title to this property which was agreed to be purchased was investigated, and this is what the mortgagee agreed to make out when the marketable title to the property would be investigated by the attorneys of the purchaser. The right, title and interest of the mortgagor would be investigated at the time when the indenture of mortgage was entered into. Nonetheless, the mortgagee would agree to make out a marketable title so far as the right, title and interest of the mortgagor was concerned, because he, in the exercise of the power of sale which was reserved to him under the indenture of mortgage, would also be conveying to the purchaser the equity of redemption on the completion of the agreement. That is how he would have to make out a marketable title to the property. It is not imported in the terms of cl. 5 of the agreement that the mortgagee would convey the property to the purchaser, whatever the conduct or the attitude of the mortgagor would be thereafter, and by no stretch of imagination could it be stated that the mortgagee absolutely agreed to convey the property to the purchaser irrespective of the mortgagor thereafter seeking to exercise the right to redeem the property which he had under S. 60, T. P. Act. Both the cls. 2 and 5 of the agreement for sale have got to be read together. If cl. 5 were read in the manner in which the learned trial Judge did, it would negative all that was stated in cl. 2 and cl. 2 would be rendered nugatory. Reading, therefore, cls. 2 and 5 of the agreement together, as should be done, the only conclusion which can be arrived at is that the contract was not an absolute contract to convey the property to the purchaser irrespective of what the mortgagor would

do after the date of the agreement up to the time that the completion of the transaction took place. It was conditional on the mortgagor not exercising the right to redeem which he had under S. 60, T. P. Act.

[11] Under the circumstances aforesaid, I agree with the conclusion reached by my Lord the Chief Justice in the judgment just delivered that the contract was conditional and liable at any time before completion of the sale to be set aside by the mortgagor coming in and redeeming the property, and in the events that happened the mortgagee, the vendor, was absolved from all liability under the agreement for sale of completing the transaction.

[12] In view of the conclusion reached above, it is absolutely unnecessary to go into the other question which was discussed at considerable length in the judgment of the learned trial Judge whether the rule in *Bain v. Fothergill*, (1873 L.R. 7. H.L. 158) was contrary to the provisions of S. 73, Indian Contract Act, and was inapplicable in India. Any observations on the same would be obiter and therefore one need not go into the same. I may, however, observe that when the question crops up for determination, it may, in view of the conflicting decisions of our own appellate Court here, have to be referred to a Full Bench as was envisaged in the judgment of Sir Lallubhai Shah Ag. C. J., and Fawcett J. in *Dhanrajgirji Narsinggirji v. Tata Sons Ltd.*, 49 Bom. 1: (A. I. R. (11) 1924 Bom. 473).

[13] The result, therefore, is that the plaintiff would be entitled to a decree for Rs. 828-11-6 and the order for costs which has been already made by my Lord the Chief Justice.

D.H.

Appeal allowed.

* A. I. R. (36) 1949 Bombay 158 [C. N. 45.]

CHAGLA C. J. AND TENDOLKAR J.

M. Gulamali Abdulhussein & Co.—Appellant—v. Vishwambharlal Ruiya—Respondents.

O. C. J. Appeal No. 43 of 1948, Decided on 20th September 1948, from judgment of Bhagwati J., D/- 9th August 1948.

*(a) Arbitration Act (1940), S. 32 — Application in respect of matter, regarding which suit is barred under S. 32, is maintainable under Act — Suit for declaration as to existence or validity of arbitration agreement is barred but application in respect of it can be entertained under Act, though not under S. 33 thereof—Arbitration Act (1940), S. 33—Remedies.

When the Legislature enacted S. 32 and barred all suits with regard to the existence, effect or validity of an arbitration agreement, the object of the Legislature was that all questions with regard to these matters should be dealt with under the Arbitration Act, and not by substantive suits; and it is open to a party to make any application with regard to which a suit is barred under S. 32. Section 33 is merely one instance of such an application. The Legislature cannot conceiv-

ably deal with all possible applications that may arise with regard to which suits are barred under S. 32. The right to make such applications is *implicit* in the very terms of S. 32 itself. [Para 3]

Hence though there is no provision in the Act to enable a party to establish the existence or validity of arbitration agreement, a suit in respect of which is barred by S. 32, an application for the purpose can be entertained by the Court under the Arbitration Act, though not under S. 33 thereof. Section 33 enables a party to challenge the existence or validity of an arbitration agreement and it does not enable him to establish its existence or validity. [Paras 3 and 4]

Annotation: ('46-Man.) Arbitration Act, S 32 N 1; S 33 N 1.

Editorial Note:—The decision of the Court on this point raises an interesting question as to construction of statutes—whether a provision in an Act abolishing the right of suit in a matter impliedly creates a general right of *applying* under the Act for relief in regard to such matter and whether such a *general* right to apply may be held to exist notwithstanding the existence of a provision specifically giving a right of application in regard to a particular class of cases. It must be noted that the decision is not that there is a general right of applying to a Court for relief unless barred, similar to the right of suit under Civil P. C., S. 9; but that the right of applying to the Court in regard to the matters in respect of which a suit is barred under S. 32 is *implicit* in the section itself, i.e., is *conferred* by the section.

(b) Arbitration Act (1940), S. 2 (a) — Submission need not be signed by both parties.—It must, however, be in writing — It may be contained in contract which need not be signed by other party.—Contract may be accepted orally and in such case such party would be bound by submission clause.

Law does not require that a submission to arbitration must be signed by both the parties. The only requisite of the law is that there must be a submission in writing. If there is a submission clause in a contract, it is not necessary that that contract must be signed by the other party before the other party can be bound by the submission clause; that party may accept orally or he may accept it by writing. If a party is in a position to establish that a contract which contains a submission clause was accepted by the other party, then there would be written submission to arbitration within the meaning of the Arbitration Act: A. I. R. (27) 1940 Bom. 93, *Disting.* [Para 5]

It would depend upon the circumstances of each case whether the mere delivery of a contract note and the retention of that contract note by the other party does amount to its acceptance or not. It is a pure question of fact which would have to be decided by the Court. [Para 6]

Annotation: ('46-Man.) Arbitration Act, S 2 (a) N 4 and 5.

(c) Civil P. C. (1908), S. 100—Question of fact — Question whether delivery of contract note and its retention by other party does or does not amount to acceptance of contract is one of fact. [Para 6]

Annotation: ('44-Com.) Civil P. C., Ss 100, 101 N 39.

M. L. Maneksha and K. T. Desai—for Appellants.
H. D. Banaji and M. P. Amin, Advocate-General
— for Respondents.

Chagla C. J. — This is an appeal from a judgment of Bhagwati J. on a petition filed under the Arbitration Act, holding that the peti-

tion was maintainable and adjourning it to Court for being disposed of on the merits. A few facts leading up to this petition may be stated. The petitioners' case was that on 30th January 1948, the respondents gave oral instructions for the purchase of 500 bars of silver. On 4th February the petitioners sent a contract to be signed by the respondents. The contract was delivered to the respondents and according to the petitioners an acknowledgment was obtained in the petitioners' peon book by an employee of the respondents. On 13th February the petitioners sent a statement of account to the respondents. The respondents refused to accept the statement of account and in the correspondence that followed the respondents denied that there was any contract between the petitioners and the respondents. The petitioners filed this petition for a declaration that there was a valid contract between the petitioners and the respondents and as the contract contained an arbitration agreement, all disputes in connexion with the contract were bound to be referred to arbitration.

[2] Now, the first contention urged by the respondents was that the petition was misconceived inasmuch as in para 10 of the petition the petitioners expressly averred that the petition was filed under S. 33 and the relief that they sought was under that section, and the contention put forward was that this petition did not lie under the express provisions of S. 33, Arbitration Act. Section 33, Arbitration Act, enables a party to challenge the existence or validity of an arbitration agreement, and what is urged is that this is not a petition challenging the existence of an arbitration agreement, but it is a petition seeking to affirm the existence of an arbitration agreement. According to Mr. Maneksha, who appears for the respondents, it is only when a party wants to challenge an arbitration agreement that he can come to Court for the necessary relief, but when he wishes to affirm the existence of an arbitration agreement, it is not open to him to take out a petition under the Arbitration Act. It is important to note that under S. 32, Arbitration Act, all suits are barred with regard to the existence, effect or validity of an arbitration agreement, and Mr. Maneksha concedes that it would not be open to the petitioners to file a declaratory suit for a declaration that there is in existence an arbitration agreement. If such a suit was filed, the petitioners would be met with S. 32. Therefore, according to Mr. Maneksha, the petitioners cannot get any relief at all in any Court of law. It is true that they could file a substantive suit on their cause of action, viz., on the contract on which they rely in this petition. But their right to have the matters determined by arbitration

would not receive proper recognition or relief from any Court of law, because in this case as the factum of the contract is denied the arbitrators have no jurisdiction to determine that question. It is only when the Court has determined that question in favour of the petitioners and has held that there was a contract that the arbitrators would have jurisdiction to proceed with the reference. Now, a Court of law would hesitate considerably before coming to the conclusion that a party has an undoubted right, and yet the Legislature has provided no relief in respect of that right. It is important to note that in England a declaratory suit with regard to an arbitration agreement would lie. In India, whatever the position was prior to the passing of the present Arbitration Act, it is clear that now such a suit would be barred under S. 32.

[3] Mr. Maneksha argues that inasmuch as S. 33 expressly provides for an application for challenging an arbitration agreement and there is no provision for affirming or asserting an arbitration agreement, the Legislature has taken away such a right from a person who wishes to proceed with the arbitration on the strength of an arbitration agreement. Mr. Maneksha says that at best there may be a lacuna in the Act and it is not for a Court of law to make good such a lacuna. It is perfectly clear that when the Legislature enacted S. 32 and barred all suits with regard to the existence, effect or validity of an arbitration agreement the object of the Legislature was that all questions with regard to these matters should be dealt with under the Arbitration Act and not by substantive suits. That object is perfectly clear and patent from the terms of S. 32. It is therefore difficult to believe that having taken away the right of a party to proceed with a substantive suit, the Legislature also took away the right of a party to have the existence or the validity of an agreement determined by an application under the Arbitration Act. Mr. Maneksha is right that S. 33 would be superfluous or overlapping if the construction was put upon S. 32 that all questions with regard to the existence, effect or validity of an arbitration agreement have to be determined by applications under the Arbitration Act and not by civil suits, and that the right to make those applications is implicit in the very terms of S. 32 itself. But it may be that for greater caution the Legislature has dealt with a particular kind of application which is mentioned in S. 33. It does not, therefore, follow that because a particular kind of application is mentioned in S. 33, therefore the Legislature has not provided in the Act itself for all kinds of applications that may be made under that Act and has taken away the right with regard to the making of the

applications other than the specific application referred to in S. 33 of the Act. In my opinion, therefore, it is open to a party to make any application with regard to which a suit is barred under S. 32. Section 33 is merely one instance of such an application. The Legislature cannot conceivably deal with all possible applications that may arise with regard to which suits are barred under S. 32.

[4] Therefore, the learned Judge below was right in coming to the conclusion that the present petition was maintainable although not under S. 33, Arbitration Act.

[5] The other contention put forward by Mr. Maneksha is that there is no written submission and therefore the petition is misconceived. The position is that the petitioners are members of the Marwadi Chamber of Commerce and the respondents are not members. Therefore, *prima facie*, any rule of the Marwadi Chamber of Commerce with regard to arbitration would not bind the respondents. If the contract had been signed by the respondents, then there would be no difficulty, because the contract itself contains a term with regard to reference to arbitration. But in this case the position on the petition and the affidavit in reply is that a contract was delivered by the petitioners to the respondents and the respondents at the most retained it and did not return it to the petitioners. It is true that in Para. 11 of the affidavit in reply the respondents have taken up the contention that there was no written submission. Now, our law does not require that a submission to arbitration must be signed by both the parties. The only requisite of the law is that there must be a submission in writing. If there is a submission clause in a contract, it is not necessary that that contract must be signed by the other party before the other party can be bound by the submission clause; that party may accept the contract orally or he may accept it by writing. Therefore if the petitioners are in a position to establish that this particular contract, which contains a submission clause, was accepted by the respondents, then there would be a written submission to arbitration within the meaning of the Arbitration Act.

[6] Mr. Maneksha has relied on a judgment of Kania J. in *Shriram Hanutram v. Mohanlal & Co.* 41 Bom. L. R. 1293 : (A. I. R. (27) 1940 Bom. 93). The learned Judge there was considering the question of staying a suit and the view that the learned Judge took was that it did not follow that merely because a contract was sent to the other party and the other party retained that contract that there was necessarily an acceptance of the contract. Mr. Maneksha wants to read this decision to mean that wherever a contract note is delivered and retained by the

other party, it does not amount to acceptance, and that there would be no written submission within the meaning of the Arbitration Act. I do not read Kania J.'s judgment to mean that. It would depend upon the circumstances of each case whether the mere delivery of a contract note and the retention of that contract note by the other party does amount to acceptance or not. It is a pure question of fact which would have to be decided by the Court. But Mr. Maneksha is right to this extent that in this present case the petitioners have not averred, as they should have averred, that there was an acceptance of the contract by the respondents. The mere averment that the contract was delivered to the other side and retained by the other side is not *per se* tantamount to an averment that the contract was accepted by the other side, and although the respondents in the affidavit in reply expressly raised the issue that there was no written submission, still the petitioners did not file any affidavit in rejoinder pleading the acceptance of the contract, nor did they think fit to have the petition amended to make the necessary averment. But, in my opinion, this by itself is not sufficient to non-suit the petitioner. Bhagwati J. has ordered that the petition has got to be heard on its merits, and it would certainly be open to the respondents to urge that there was no written submission inasmuch as they never accepted the contract.

[7] I think, therefore, the fairest thing to do under the circumstances would be to direct the petitioners to amend the petition by averring that there was an acceptance of the contract by the respondents and that this particular issue would be tried along with other issues which would arise on the petition by the Court trying the petition. Mr. Maneksha is justified in urging that as the petition stands today it is liable to be dismissed because the necessary averment is not there. But that is a grievance which is very easily remedied by a proper order for costs, and we will hear Mr. Maneksha on the question of costs after this judgment is delivered.

[8] I would, therefore, dismiss the appeal and confirm the order made by Bhagwati J.

[9] **Tendolkar J.**—I agree.

[10] **Per Curiam.**—Having heard counsel on the question of costs, we think that the fairest order to make would be to vary the order made by Bhagwati J. with regard to the costs by directing that the petitioners should pay to the respondents the costs of the hearing of the petition before Bhagwati J., and with regard to the costs in the appeal we order that the respondents should pay to the appellants half the costs of the appeal.

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[11] The petitioners to make the necessary amendment within two days. Petitioners to pay the costs of and incidental to the amendment. Liberty to the respondents to file any supplemental affidavit in reply to the amendment made by the petitioners to their petition within a week after the amendment. Petitioners also to pay the costs of any supplemental affidavit filed by the respondents.

R.G.D.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 161 [C. N. 46.]

WESTON AND CHAINANI JJ.

Rana Birpal Singh—Applicant v. Emperor.

Criminal Appln. No. 999 of 1948, Decided on 13th September 1948.

Criminal P. C. (1898), S. 491 (3)—Warrant issued before 15th August 1947 under Bengal State Prisoners Regulation (1818) for reasons connected with discharge of functions of Crown in its relations with Indian States—Detention of detenu after 15th August 1947 is outside Regulation as it now stands—High Court entitled to exercise its powers under S. 491.

Section 491 (3) is not a bar to the High Court's ascertaining whether a detention is in fact a detention under the Bengal State Prisoners Regulation (1818). Whether a detention is or is not a detention under the Regulation is a matter of substance and is not concluded by the circumstance that the Regulation is mentioned in the warrant. [Para 13]

Where a warrant was issued before 15th August 1947 for reasons connected with the discharge of the functions of the Crown in its relations with Indian States which had no existence after that date :

Held that though this was valid warrant at the time it was issued the detention of the detenu after 15th August 1947 was entirely outside the Regulation as it now stands and, therefore, was not a detention under the Regulation. Hence S. 491 (3), was no bar to the exercise of the powers of the High Court under S. 491: A. I. R. (33) 1946 F. C. 2, *Ref.* [Para 13]

K. L. Gauba, S. G. Patwardhan and H. N. Shambhag—for Applicant.

Government Pleader—for the Crown.

Weston J.—This is an application under S. 491, Criminal P. C., 1898, made on behalf of Rana Birpal Singh who is now under detention in the Central Mental Hospital, Yeravda. Birpal Singh was the Ruler of Bhajji, one of the Simla Hill States, for a number of years up to the year 1940, and it is claimed that thereafter he continued *de jure* to be the Ruler of that State. In September 1940 he was detained in the Ripon Hospital, Simla, under warrant bearing the signature of an Additional Secretary to the Government of India, issued under the Bengal State Prisoners Regulation, 1818. Since that time he has remained under detention. In the year 1941 he was removed from Simla to the Mental Hospital at Lahore under a further warrant issued under the same Regulation, and in that year an Ordinance was promulgated to remove

doubts as to the validity of the detention in Mental Hospitals of persons on warrants issued under the Bengal State Prisoners Regulation. In the year 1943, a *habeas corpus* application was preferred to the Lahore High Court by or on behalf of Birpal Singh, but the High Court and the Federal Court in appeal declined to interfere. In consequence of certain observations made by the Lahore High Court as to the desirability of transferring Birpal Singh to a more congenial climate, he was transferred to the Central Mental Hospital, Yeravda, by warrant dated 21st January 1946, also under the Bengal State Prisoners Regulation, 1818, and addressed to the Superintendent of that Hospital. Since then he has remained there, and his present detention is claimed on behalf of the Government to be justified by the warrant of 21st January 1946. We understand that prior to 15th August 1947, two applications were preferred to this Court by Birpal Singh himself which were summarily rejected.

[2] It is now urged on behalf of Birpal Singh that by reason of the constitutional changes which took place in August 1947 the warrant under which he is being detained has ceased to have effect and that his detention is now illegal.

[3] The warrant of 21st January 1946, is in the following terms:

"Whereas the Governor-General in Council, for good and sufficient reasons, being reasons connected with the discharge of the functions of the Crown in its relations with Indian States, has seen fit to determine that Birpal Singh, ex-Rana of Bhajji, shall be placed under personal restraint at the Central Mental Hospital, Yeravda, Poona, you are hereby required and commanded, in pursuance of that determination, to receive the person abovenamed into your custody, and to deal with him in accordance with the orders of the Government and the provisions of the Bengal State Prisoners Regulation, 1818."

[4] Under S. 1, which is the preamble, of the Bengal State Prisoners Regulation, 1818, as it stood when the warrant with which we are concerned was issued, the very exceptional powers of detention provided by the Regulation were exercisable:

"For reasons of State, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in territories of Native Princes entitled to its protection and the security of the British dominions from foreign hostility and from internal commotion."

[5] Section 2 sets out that the detention, or personal restraint as it is termed, shall be by warrant of commitment issued by the Government to the officer in whose custody such person is to be placed, and provides that the warrant shall be in one of the forms, set out in the Appendix to this Regulation, which is appropriate to the case. Two forms of warrant are set out in the Appendix. The first reads as follows:

"Forms of commitment for reasons connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States.

To the (here insert the officer's designation).

Whereas the (Governor-General in Council) (Governor-General) (omit the inappropriate words) for good and sufficient reasons being reasons connected with (defence, external affairs, and the discharge of the functions of the Crown in its relations with Indian States) (omit any inappropriate words) has seen fit to determine that (here insert the State prisoner's name) shall be placed under personal restraint at (here insert the name of the place) you are hereby required and commanded in pursuance of that determination to receive the person abovenamed into your custody and to deal with him in accordance with the orders of the Government and the provisions of the Bengal State Prisoners Regulation, 1818."

The second form of warrant is to be used when the "good and sufficient reasons," are reasons connected with the maintenance of the public order, and issue of this form of warrant could also be made by or under the order of the Governor of a Province.

[6] The warrant of 21st January 1946, was in the first form, and the basis of the warrant was the third of the 'good and sufficient reasons' which could justify such a warrant being issued, namely, reasons connected with the discharge of the functions of the Crown in its relations with Indian States.

[7] There can be no doubt that this was a legal and valid warrant at the time it was issued, and in any event by reason of the decision of the Federal Court, *Birpal Singh of Bhajji State v. Emperor*, A. I. R. (33) 1946 F. C. 2 : (47 Cr. L. J. 583), no exception could now be taken to its initial validity. But equally there can be no doubt that from 15th August 1947, the basis of the warrant, the reasons connected with the discharge of the functions of the Crown in its relations with Indian States, has ceased to have any existence. For this it is sufficient to refer to S. 7, Indian Independence Act, without setting it out at length. While certain relations between the Dominion of India and the Indian States have come into being after 15th August 1947, those relations are in no way a continuation or delegation of the former relations of the Crown with Indian States. Paramountcy lapsed. It was not transferred to the Dominion.

[8] On 14th August 1947, the Governor-General, in exercise of the powers conferred by S. 9 (1), Indian Independence Act, made an order styled: *The India (Adaptation of Existing Indian Laws) Order, 1947*. It is convenient to set out here certain articles of that Order, namely, Arts. 8, 7 and 12. Article 3 reads as follows:

"As from the appointed day, all existing Indian laws shall until repealed or altered or amended by a competent legislature or other competent authority, in their application to the Dominion of India and any part or

parts thereof, be subject to the adaptations directed in this Order."

Article 7 is as follows:

"Any reference in an existing Indian law to the exercise of the functions of the Crown in its relation with Indian States (including any provision the operation of which depends on the exercise of such functions) shall be omitted, and references in any such law to the Crown Representative shall be omitted or construed as reference to the Central Government as the context may require."

Article 12 provides:

"The provisions of this Order shall not render invalid anything duly done before the appointed day under an existing Indian law, and anything so done for British India or for parts thereof including territories thereafter included in the Dominion of India shall, as from the appointed day and until altered, varied or undone, have effect as if it had been done after the appointed day for the whole of the Dominion of India or, as the case may be, for such territories thereof as aforesaid, by a competent authority and under and in accordance with the provisions then applicable to the case."

No adaptation of the Bengal State Prisoners Regulation, 1818, was made in express terms by this Order.

[9] On 26th August 1947, the Governor-General in exercise of the same powers under S. 9, Independence Act, made a further Order styled: The Bengal State Prisoners Regulation (Adaptation) Order, 1947. This Order is expressed to have effect from 15th August 1947. The material alterations made are that for the words in S. 1 of the Regulation, set out earlier in this judgment, beginning with "for reasons of State" and ending with "internal commotion" were substituted the words "for reasons of State connected with defence, external affairs or relations with Acceding States or with the maintenance of public order," and for the words "the discharge of the functions of the Crown in its relations with Indian States" wherever they occurred including in the Appendix were substituted the words "relations with Acceding States."

[10] Article 3 of this Order states that the provisions of this Order shall have effect notwithstanding anything to the contrary contained in the India (Adaptation of Existing Indian Laws) Order, 1947, and this seems to me to have been made to avoid any difficulty of interpretation by reason of the fact that by Art. 7 of the earlier Order all references in existing Indian laws to the exercise of the functions of the Crown in its relation with Indian States have been directed to be omitted. No provision is made in the later Order for the continuing validity of warrants issued under the Bengal State Prisoners Regulation, 1818, prior to 15th August 1947. It is convenient to tabulate the reasons of State by which detention under the Regulation was

justified before and after the adaptation by the Order of 26th August 1947.

Reasons of State *before* the Adaptation.

Connected with defence.

Connected with external affairs.

Connected with the discharge of functions of the Crown in its relation with Indian States.

Connected with the maintenance of public order.

Reasons of State *after* the Adaptation.

Connected with defence.

Connected with external affairs.

Connected with relations with acceding States.

Connected with the maintenance of public order.

Three of the four sets of reasons have remained unaffected. The third set of reasons under the Regulation as it stood prior to 15th August 1947, namely, reasons connected with the discharge of the functions of the Crown in its relations with Indian States, has been replaced by reasons connected with relations with acceding States.

[11] If the warrant in the present instance had been issued under any of the three reasons which are common to the Regulation as it stood before and after 15th August 1947, it might be claimed that the warrant remained valid by virtue of Art. 12, India (Adaptation of Existing Indian Laws) Order, 1947, notwithstanding the constitutional changes and the adaptations made to the Regulation.

[11a] But the warrant in the present instance was issued for reasons of State which have had no existence after 15th August 1947. It is perfectly true that other reasons of State have taken their place in the Regulation as it now stands, but these other reasons have no legal relation at all to those stated in the warrant. It may be that Government still consider, for any of the reasons of State provided in the Regulation as it now is, that further detention of Birpal Singh is desirable. If this is so it is for Government to effect his detention by valid warrant under the existing Regulation or other appropriate enactment. Obviously it is not within our province to amend the warrant, nor can it possibly be said that one reason of State has become another because of the amendment to the Regulation. I notice from the copy of the Instrument of Accession which has been filed that Bhajji became an acceding State on 26th September 1947. It would appear, therefore, that between 15th August 1947, and 26th September 1947, no warrant could have been issued against Birpal Singh under the Regulation for reasons of State connected with the relations with Bhajji as an acceding State, and this is enough to destroy any argument of continuity of the present warrant beyond 15th August 1947.

[12] The learned Government Pleader when opposing this application has relied upon sub-

s. (3) of s. 491, Criminal P. C. The material part of this reads as follows: "Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818."

[13] I am not able to accept that this proviso is a bar to our ascertaining whether a detention is in fact a detention under the Bengal State Prisoners Regulation, 1818. If it is such a detention, then of course the proviso prevents our interference, for, it is well settled that it is by reason alone of s. 491, Criminal P. C., that the powers of the High Courts to issue writs of the nature of *habeas corpus* exist. But whether a detention is or is not a detention under the Regulation is a matter of substance, and is not concluded by the circumstance that the Regulation is mentioned in the warrant. The Regulation provides that detention may be made for one or more of certain specific reasons, which reason or reasons must be stated in the warrant; and if in a warrant one reason only is stated which is not a reason finding place in the Regulation, then the detention is not a detention under the Regulation at all. That is the position here. The present detention is something entirely outside the Regulation as it now stands, and therefore is not a detention under the Regulation, and the third proviso to s. 491 of the Code is no bar to the exercise of our powers under the section.

[14] The rule, therefore, is made absolute. Birpal Singh has now been produced before us, and he must be set at liberty.

[15] **Chainani J.**—I agree that the detention of Rana Birpal Singh, ex-Ruler of Bhajji, is at present unlawful. He is detained in the Mental Hospital at Poona under a warrant dated 21st January 1946, issued by the Central Government under s. 2, Bengal State Prisoners Regulation, 1818. The reasons for detention as given in the warrant are "for reasons connected with the discharge of the functions of the Crown in its relations with Indian States." At the time when the warrant was issued, this was one of the grounds for which a person could be detained under the Regulation. On 26th August 1947, the Governor-General, in exercise of the powers conferred by s. 9, Indian Independence Act, issued the Bengal State Prisoners Regulation (Adaptation) Order, 1947. By this Order, the Bengal State Prisoners Regulation, 1818, was amended, and the words "discharge of the functions of the Crown in its relations with Indian States" were deleted with retrospective effect from 15th August 1947. After 15th August 1947, it is therefore not open to Government to detain a person for reasons connected with "the discharge of the functions of the Crown in its relations with Indian States." The only reasons for which a

person can now be detained are "reasons of State connected with defence, external affairs, or relations with acceding States or with the maintenance of public order." The detenu in this case is admittedly not detained at present for any of these reasons. There is also no provision in the Bengal States Prisoners Regulation (Adaptation) Order, 1947, validating the warrants issued before 15th August 1947. There is no saving clause similar to cl. 12, India (Adaptation of Existing Indian Laws) Order, 1947. The warrant under which the detenu is now being detained is, therefore, no longer valid, for such a warrant cannot be issued under the Regulation as adapted by the Order of 26th August 1947.

[16] It has been urged by the learned Government Pleader that this Court has no jurisdiction to pass orders in this matter, in view of the provisions of sub-s. (3) of s. 491, Criminal P. C. This matter was also raised before the Federal Court in *Birpal Singh of Bhajji State v. Emperor*, A. I. R. (33) 1946 F. C. 2 : (47 Cr. L. J. 583) and it has been held by that Court that the jurisdiction of the High Court is ousted, only if the Court is satisfied that "the detenu is a person detained under the Regulation." The material question for determination therefore is whether the detenu in this case can now be said to be a person detained under the Regulation of 1818. This must obviously be answered in the negative, for the detenu is detained for reasons "connected with the discharge of the functions of the Crown in its relations with Indian States." The Regulation as amended does not authorise detention for these reasons. The detention at present cannot, therefore, be said to be a detention under the Regulation, as it stands today. We have, therefore, jurisdiction to interfere in this case.

[17] The rule is, therefore, made absolute. The detenu should be released forthwith.

D.H.

Rule made absolute.

A. I. R. (36) 1949 Bombay 164 [C. N. 47.]

DIXIT AND JAHAGIRDAR JJ.

Govind Dhondo Kulkarni — Plaintiff — Applicant v. Vishnu Keshav Kulkarni and others — Defendants—Opposite Party.

Civil Appln. No. 1433 of 1945, Decided on 17th December 1947.

Civil P. C. (1908), S. 110 — Affirmance, meaning of — Question of law—Decree of lower Court varied by High Court in favour of applicant — Decree is one of affirmance — Question whether property is joint family property does not involve question of law.

The applicant claiming to be the adopted son of one D, filed a suit to recover by partition possession of his share in the suit property. The lower Court held that the property was joint family property but since the plaintiff's adoption was held invalid the suit was dis-

missed. On appeal the High Court set aside the decree of lower Court and held that the adoption was valid. It further held that only a part of the property was joint family property. The result was that applicant's claim was allowed with respect to such portion only :

Held that even though the decree appealed from varied the decision of the lower Court the variation being in favour of the applicant, the decree must be regarded to be one of affirmance. The question whether the property was joint family property or self-acquired was essentially one of fact. The property held to be joint family property was not sufficient to form the nucleus with which the remaining property could have been acquired. The appeal, therefore, did not involve any question of law : A. I. R. (16) 1929 Bom. 359 and A.I.R. (34) 1947 P. C. 189, *Rel. on; Case law referred.* [Paras 7 and 8]

Annotation : ('44-Com.) Civil P. C., S. 110, N. 13, Pt. 6.

K. R. Bengeri for G. R. Madbhavi — for Applicant.
S. B. Jathar — for Opposite Party Nos. 2 to 5.

Dixit J.—This is an application for leave to appeal to His Majesty in Council and the facts giving rise to the application are briefly these. The applicant claiming to be the adopted son of one Dhondo Govind Kulkarni filed a suit to recover by partition possession of his half share in the suit property. The plaintiff's claim was opposed on several grounds. It was contended that the plaintiff was not adopted in fact, that the plaintiff's adoption was invalid and that in any case the suit property, with the exception of two houses and two lands, was not joint family property. The plaintiff valued his claim in the Court of first instance at Rs. 12,012-8 0. The trial Court held that the plaintiff had proved his adoption but his adoption was invalid. The trial Court also held that the whole of the property in suit was joint family property. But since the plaintiff's adoption was invalid, the trial Court dismissed the plaintiff's suit. From that decision the plaintiff filed F. A. No. 169 of 1941 in this Court and this Court set aside the decree of the Court below and declared that the plaintiff's adoption by defendant 1 was proved and was valid. This Court further held that out of the immoveable properties described in the plaint, only the first house in para. 1, cl. A, and the two kulkarni watan lands R. S. Nos. 256/5 and 311/7 at Kudnur described in para. 1, cl. C, were joint family properties. The result was that the plaintiff's claim was allowed with respect to some of the properties and that his claim in respect of the remaining properties was rejected. The plaintiff now applies for leave to appeal to His Majesty in Council and the question is whether we should grant him the certificate he has applied for.

[2] This question has to be answered by reference to S. 110, Civil P. C. That section, so far as material, provides :

"In each of the cases mentioned in cls. (a) and (b) of S. 109, the amount or value of the subject-matter of the

suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards, and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

[3] The first requirement according to S. 110 is that the value of the subject-matter of the suit in the Court of first instance must be Rs. 10,000 or upwards. This part of the requirement is satisfied. The further requirement is that the value of the subject-matter in dispute on appeal to His Majesty in Council must also be the same sum or upwards. The applicant in his affidavit stated that the value of the subject-matter on appeal to His Majesty in Council was Rs. 10,048-5-6. This will appear from an affidavit filed by him on 3rd December 1947. The opponents have not by a counter-affidavit challenged this valuation. It is, therefore, clear that the value of the subject-matter in dispute on appeal to His Majesty in Council is also Rs. 10,000 or upwards. The first requirement of S. 110 is, therefore, fulfilled.

[4] The next question is whether it is necessary for the applicant to show that the appeal involves some substantial question of law. It is urged on behalf of the applicant that it is not necessary for him to show that the appeal involves a substantial question of law, because it is contended that the decree appealed from did not affirm the decision of the Court immediately below the Court passing such decree. The expression "the decision" occurring in S. 110 means "the decree." See *Rajah Tasaddug Rasul Khan v. Manik Chand*, 30 I. A. 35 : (25 ALL 109 P. C.). A simple case of affirmance would be where the decree appealed from confirms the decree of the Court immediately below the Court passing such decree. A case in the opposite sense would be where the decree appealed from reverses the decree of the Court immediately below the Court passing such decree. Another case may arise where the decree appealed from varies or modifies the decision of the Court immediately below the Court passing such decree, and the question is whether in such a case it is necessary for the applicant to show that the appeal involves some substantial question of law.

[5] The expression "affirms" occurring in S. 110 has given rise to sharp conflict of judicial opinion. One view is that if the decree appealed from varies the decision of the lower Court to the prejudice of the applicant, it is not a decree of affirmance, but another view is that it would be a decree of affirmance if the variation is in favour of the applicant. In *Rajah Brajasunder Deb v. Raja Rajendra Narayan Bhanj Deo*, 20

Pat. 459 : (A. I. R. (28) 1941 Pat. 269 S. B.) a Special Bench of the Patna High Court took the view that where the decree of the High Court reversed in part the decision of the lower Court whilst maintaining it with regard to the remainder of the claim, the decree of the High Court cannot be said to affirm the decision of the Court below. A reference to that decision shows that the learned Judges of the Patna High Court reviewed the case-law upon the point. In that case the case in *Kapurji v. Pannaji*, 31 Bom. L. R. 619 : (A. I. R. (16) 1929 Bom. 359) was cited but it was not apparently followed.

[6] On behalf of the opponents it is urged, relying upon *Kapurji Magnirm's case* : (31 Bom. L. R. 619 : A. I. R. (16) 1929 Bom. 359), that this question is concluded by authority. In that case the facts were that this Court varied the decree of the lower Court in favour of the applicant and the applicant being dissatisfied with the decision desired to appeal to their Lordships of the Privy Council. In the appeal the applicant challenged a havala item of Rs. 18,000 upon which there was a concurrent finding both of the trial Court as well as of this Court. Sir Amberson Marten, after referring to the case in *Annapurnabai v. Ruprao*, 51 I. A. 319 : (A. I. R. (12) 1925 P. C. 60) and the case in *Bhagwan Singh v. Allahabad Bank Ltd.*, 43 ALL. 220 : (A. I. R. (8) 1921 ALL. 270) refused the application. It is true that in that case there were concurrent findings of the Courts upon the havala item of Rs. 18,000 which was the item in dispute on appeal to His Majesty in Council. But the fact remains that although there was in that case a variation in the decision of the lower Court, leave was refused.

[7] In the present case the dispute before their Lordships of the Privy Council would be concerning the claim of the plaintiff with respect to properties in regard to which his claim has been rejected by both the Courts. The trial Court dismissed the plaintiff's suit on the ground that the plaintiff's adoption was invalid. This Court while holding that the plaintiff's adoption was valid held that the whole of the property with the exception of two houses and two lands mentioned in cls. A and C of para. 1 of the plaint was the self-acquired property of the contending defendants. The question whether certain property is joint family property or self-acquired property is, I think, essentially a question of fact. The appeal, therefore, does not involve a question of law, much less a substantial question of law. But Mr. Bengeri on behalf of the applicant argues, relying upon s. 233, sub.s. (2) of Sir Dinshah Mulla's Principles of Hindu Law, 1940 edition, that in this case a substantial question of law does arise. According to the

plaintiff's guardian the income from the two lands which are held to be ancestral lands would at present be about Rs. 200 or Rs. 250. It is not suggested that the house property yields any income. This Court, therefore, after taking into consideration the income of what can be said to be joint family property came to the conclusion that remaining property could not have been acquired with this nucleus. A reference to the judgment shows that this Court accepted the principle of the case in *Babubhai Girdharlal v. Ujamlal Hargovandas*, I. L. R. (1937) Bom. 708 : (A. I. R. (24) 1937 Bom. 446) and in support of the view this Court also accepted the principle laid down in *Vythianatha v. Varadaraja*, I. L. R. (1938) Mad. 696 : (A. I. R. (25) 1938 Mad. 841). It is, therefore, clear that the house property and the two lands which were held to be ancestral property was not sufficient to form a nucleus with the help of which new properties could have been acquired. The principle of *Babubhai Girdharlal's case*, (I. L. R. (1937) Bom. 708 : A. I. R. (24) 1937 Bom. 446) has been accepted by their Lordships of the Privy Council in the recent judgment of the Board in *Appalaswami v. Suryanarayanamurti*, A. I. R. (34) 1947 P. C. 189 : (I. L. R. (1948) Mad. 440). It may be of interest to note that the judgment has been delivered by Sir John Beaumont who decided the case in *Babubhai Girdharlal v. Ujamlal Hargovandas*, I. L. R. (1937) Bom. 708 : A. I. R. (24) 1937 Bom. 446). Having regard to these considerations, we are unable to hold that the appeal raises a substantial question of law.

[8] In this case the variation in the decision of the Court below is in favour of the applicant. The view which we take is that even though the decree appealed from varied the decision of the lower Court, the decree must be regarded to be one of affirmance. That being our view, it is necessary for the applicant to show that the appeal involves some substantial question of law. But as, in our opinion, the applicant is unable to show that the appeal involves a substantial question of law, we must refuse the leave asked for.

[9] The result is that the application fails and the rule must be discharged with costs.

[10] **Jahagirdar J.** — I agree. The principal question in this application is whether the decree appealed from affirms the decision of the trial Court. The petitioner has filed the suit to recover possession of his half share by partition alleging that he is the adopted son of one Dhondo Govind Kulkarni who died joint with the other defendants. His contention was that he was adopted by defendant 1, the widow of Dhondo, and he had a share in the joint family property. The defendants contended that the plaintiff's adoption

had not taken place and was invalid and that the bulk of the suit property was the self-acquired property of the defendants. The trial Court held that the plaintiff's adoption had taken place but was invalid on account of the unchastity of defendant 1 and that the entire suit property was joint family property. But it dismissed the suit as it came to the conclusion that the adoption was invalid. The petitioner went in appeal to the High Court. The High Court held that the adoption was valid and it also found that the bulk of the property in suit was the self-acquired property of the contending defendants. It, therefore, allowed the appeal in respect of the property which was found to be joint family property, and it may be stated here that the property which is found to be joint family property is a very small portion of the entire suit property.

[11] Now, the petitioner has filed this application for leave to appeal to the Privy Council and he contends that as the decree of the High Court has varied the decree of the trial Court, he is entitled to go in appeal without being put to the necessity of showing that there is some substantial question of law. The question, therefore, is whether the decree against which he wants to prefer an appeal can be said to have affirmed the decision of the trial Court.

[12] Apart from authorities if we merely look at the section, it appears to me clear that the present decree is a decree of affirmance. The wording of S 110, last paragraph, of the Code of Civil Procedure is this :

"Where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law."

[13] Now, what is the decree here appealed from? The decree appealed from cannot be that part of the decree which has allowed the appeal in favour of the petitioner. It must be that part of the decree which has affirmed the decision of the Court immediately below the Court passing such decree. So here the decree appealed from is that part of the decree of the High Court which confirmed the decree of the trial Court dismissing the plaintiff's claim with regard to the bulk of the suit property which has been held to be separate property of the contending defendants. On this point the decisions of the trial Court and the High Court are concurrent. The trial Court dismissed the entire suit and the appeal Court has also dismissed the plaintiff's suit so far as the property held to be the self-acquired property of the defendants was concerned. It is, therefore, clear that with regard to the property which is the subject-matter of the appeal to the Privy Council, the decisions of both the Courts are concurrent. It was possible to

have argued, though it was not argued here, that the decisions of the two Courts are different. The trial Court had held that the entire suit property was the joint family property, whereas the High Court has held that the bulk of the property was the self-acquired property of the contending defendants. But it has been authoritatively decided that the word "decision" in para. 3, S. 110, Civil P. C., means a decree and not a judgment : see *Rajah Tasaddug Rasul-khan v. Manik Chand*, 30 I. A. 35; (25 ALL. 109 P. C.). Therefore, though the reasons for the ultimate decision of the suit may be entirely different, the decree of the trial Court as well as the appellate Court is the same, viz., it dismissed the suit of the plaintiff with regard to the self-acquired property. Mr. Bengeri, the learned advocate for the petitioner, relies upon the Privy Council case in *Annapurnabai v. Ruprao*, 51 I. A. 319 : (A. I. R. (12) 1925 P. C. 60) and contends that as the decree of the trial Court is varied by the High Court, he is entitled as a matter of right to go in appeal to the Privy Council whether that portion of the decree of the High Court varying the decree of the trial Court is in favour of the petitioner or not. And Mr. Bengeri also relies upon two Full Bench cases of Patna and Allahabad High Courts (*Raja Brajasunder Deb v. Raja Rajendra Narayan Bhanj Deo*, 20 Pat. 459 : (A. I. R. (28) 1941 Pat. 269) and *Jaggo Bai v. Harihar Prasad Singh*, I. L. R. (1941) ALL. 180 : (A. I. R. (28) 1941 ALL. 66) where this Privy Council ruling in *Annapurnabai v. Ruprao*, 51 I. A. 319 : (A. I. R. (12) 1925 P. C. 60) has been interpreted. According to those two High Courts whenever there is a variation of the decree by the High Court, whether it is in favour of the petitioner or not, the petitioner gets a right to appeal to the Privy Council without being put to the necessity of showing any substantial question of law. But the Bombay High Court in *Kapurji v. Pannaji* 31 Bom. L. R. 619 : (A. I. R. (16) 1929 Bom. 359) has taken the view that if the variation is in favour of the petitioner, it cannot be said that the decree of the High Court has varied the decree of the trial Court within the meaning of S. 110, Civil P. C. The headnote in that case runs thus :

"Under S. 110, Civil P. C., to warrant the grant of leave to appeal to His Majesty in Council, there must be a substantial question of law in cases where there are concurrent findings of facts which are appealed from. It is not enough that the decree of the lower Court is varied by the High Court on points not covered by the appeal to the Privy Council."

In this case *Annapurnabai v. Ruprao*, 51 I. A. 319 : (A. I. R. (12) 1925 P. C. 60) was cited and their Lordships did not interpret the ruling to mean that any slight variation of the decree

with regard to the property, which is not the subject-matter of the appeal before the Privy Council, would entitle the petitioner to go in appeal. This decision is binding on us. And again the Madras and Lahore High Courts, in *Kailasa v. Kasivishwanatham*, I. L. R. (1944) Mad. 890; (A. I. R. (31) 1944 Mad. 269) and *Wahid-ud-Din v. Makhan Lal*, I.L.R. (1945) 26 Lah. 242; (A.I.R. (31) 1944 Lah. 458 (F.B.)), have held that if the decree is varied in favour of the petitioner and if the petitioner goes in appeal against that part of the decree which confirmed the decision of the trial Court, then the decree of the High Court is one of affirmance and not of variation.

[14] Now, looking broadly it appears to me that the view taken by the Bombay, Madras and Lahore High Courts is the correct one. Supposing the entire appeal has been dismissed, it would not have given the petitioner a right to appeal, and it would be very strange that if the appeal is partly allowed in his favour, he gets the right to appeal as a matter of course. We, therefore, think that the petitioner in this particular case is not entitled to a certificate unless he satisfies us that there is a substantial point of law.

[15] It is contended by Mr. Bengeri that it is shown here that there was some nucleus which was yielding an income of Rs. 100 to Rs. 125 and his contention is that the moment he proves that there was some nucleus there should be a presumption that all the property of the family which has been subsequently acquired is the joint family property, whether the nucleus was capable of yielding any income or not.

[16] But this is not what the cases have laid down. The latest pronouncement of their Lordships of the Privy Council is in *Appalaswami v. Suryanarayanamurti*, A. I. R. (34) 1947 P. C. 189 : (I. L. R. (1948) Mad. 440). There Sir John Beaumont giving the judgment on behalf of the Board has observed (p. 192) :

"Where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

And he has relied upon the cases, *Babubhai Gir-dharlal v. Ujamlal Hargovandas*, I.L.R. (1937) Bom. 708 : (A. I. R. (24) 1937 Bom. 446) and *Vythianatha v. Varadaraja*, I.L.R. (1938) Mad. 696 : (A. I. R. (25) 1938 Mad. 841). In the last-mentioned case it is laid down :

"A party alleging that property held by an individual member of a joint Hindu family is joint family property must show that the family was possessed of some nucleus with the aid of which the property in question could have been acquired. Mere existence of a nucleus, however small or insignificant, is not enough. It should be shown that the nucleus was of such value as could have reasonably formed the basis of the acquisition of

the property in question. If this is shown, and only then, the onus shifts to the party alleging self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate."

[17] These two cases have been quoted with approval in *Appalaswami v. Suryanarayanamurti*, (A. I. R. (34) 1947 P. C. 189 : I. L. R. (1948) Mad. 440). We have, therefore, to see whether in this case the nucleus was such as would have enabled the defendants to acquire property out of the income thereof. It has been found that the annual income of the nucleus was only Rs. 100 or Rs. 125. This could have been hardly sufficient for the maintenance of the family and it is clear that out of the income of this property the defendants could not have acquired the property in dispute. We, therefore, hold that the petitioner has failed to show that the appeal involves any substantial question of law.

[18] The rule is, therefore, discharged with costs.

D.H.

Rule discharged.

A. I. R. (36) 1949 Bombay 168 [C. N. 48.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Kalidas Amtharam — Accused — Applicant v. Emperor.

Criminal Revn. Appln. No. 584 of 1948, Decided on 16th July 1948, from order of 2nd Addl. Magistrate, 1st Class, Ahmedabad.

Bombay Harijan (Removal of Social Disabilities) Act, 1946 (X [10] of 1947)—Act whether ultra vires—Act falls within item 1 of List III, Sch. 7, Government of India Act (1935)—Act intra vires of Provincial Legislature.

The Provincial Legislature concurrently with the Federal Legislature is competent to legislate with regard to all matters included in the Penal Code. They are also competent to legislate with regard to all matters relating to criminal law so long as they do not affect offences against laws which are enumerated in List I and List II in Sch. 7, Government of India Act (1935). Reading Bombay Harijan (Removal of Social Disabilities) Act as a whole, it is clear that it was the view of the Legislature that social disabilities from which the Harijans suffer should be removed. According to the Legislature, anyone who was privy to the continuance of these social disabilities should be punished, and the Legislature also took the view that the only way that the Harijans' status and position could be improved was by punishing those who continued to inflict disabilities upon Harijans. Therefore, in passing this Act, what the Legislature has done is to add to the body of criminal law. It has created new offences. Therefore, this Act falls in item 1 of List III and it was competent to the Provincial Legislature to pass this piece of legislation. [Paras 1, 2 and 3]

B. G. Thakor — for Applicant.

M. P. Amin, Advocate-General and S. G. Patwardhan, Government Pleader — for the Crown.

Chagla C. J. — This is an application for revision against an order made by the Second Additional First Class Magistrate, Ahmedabad, rejecting the petitioner's contention that the Act under which he was charged was invalid. That

view was also upheld by the learned Sessions Judge, Ahmedabad. The accused was charged for an offence under S. 7, Bombay Harijan (Removal of Social Disabilities) Act, 1946, for having refused to serve tea to a Harijan in his tea shop, and the contention raised by the applicant was that this Act was *ultra vires* of the Provincial Legislature. This contention was based on the argument that the subject of removal of the social disabilities of Harijans does not form part either of List II or List III in Sch. 7, Government of India Act, and therefore the Provincial Legislature was not competent to legislate on this subject. The learned Magistrate took the view that as this Act had received the assent of the Governor-General, the Governor-General by implication had constituted this subject as a new subject on which the Provincial Legislature could legislate, that subject not having been originally included in List II or List III in Sch. 7. The learned Sessions Judge rightly, in our opinion, did not accept that contention because there has been no public notification by the Governor-General as required by S. 104, Government of India Act. The learned Sessions Judge took the view that the subject of the Act was covered by item 28 in List II, which item is "Inns and innkeepers." Now, in construing the Lists in the Government of India Act we must not overlook the fact that this is a Parliamentary Legislation and Parliament was using language which is well known and understood in English legal phraseology, and the expression "Inns and innkeepers" has a definite connotation in English law. In our opinion, it would not be correct to say that the law regulating restaurants or tea shop-keepers would fall in the category of inns and innkeepers. But with respect to the learned Sessions Judge, it is taking too narrow a view of this Legislation to say that all that it did was it regulated the business of a tea shop-keeper and prohibited the tea shop-keeper from refusing to serve tea to a Harijan. In any case, it is not necessary finally to decide this question as to whether the learned Sessions Judge on this point is right or not, because, in our opinion, the subject of the impugned Legislation clearly falls under item 1 of List III which is the concurrent List. That item is :

"Criminal law including all matters included in the Penal Code at the date of the passing of this Act, but excluding offences against laws with respect to any of the matters specified in List I or List II and excluding the use of His Majesty's naval, military and air forces in aid of the civil power."

Therefore, the Provincial Legislature concurrently with the Federal Legislature is competent to legislate with regard to all matters included in the Penal Code. They are also competent to legislate with regard to all matters relating to criminal

law so long as they do not affect offences against laws which are enumerated in List I and List II.

[2] Now, the whole basis of Mr. Thakor's argument is that the subject-matter of this legislation does not fall in List I or List II and, therefore, in our opinion, it is competent to the Provincial Legislature to create a new offence with regard to a subject which is not dealt with in List I or List II. Now, turning to the scheme of the impugned legislation, the preamble states that the legislation is passed in order to provide for the removal of the social disabilities of Harijans. Section 3 enumerates what are the disabilities of the Harijans and how they should be got rid of and declares their rights in these respects. Section 4 refers to the discriminations exercised against Harijans. Section 5 calls upon the Courts not to recognise any custom or usage imposing any civil disability on any Harijan. Section 6 gives a direction to legal authorities not to recognise any custom or usage imposing any civil disability on the Harijans. And S. 7 is the penal section which provides for penalties for offences committed by anyone who contravenes the provisions of the Act. Now, reading this statute as a whole, it is clear that it was the view of the Legislature that social disabilities from which the Harijans suffer should be removed. According to the Legislature, anyone who was privy to the continuance of these social disabilities should be punished, and the Legislature also took the view that the only way that the Harijan's status and position could be improved was by punishing those who continued to inflict disabilities upon Harijans. Therefore, in passing this Act, what the Legislature has done is to add to the body of criminal law. It has created new offences. According to Mr. Thakor, the pith and substance of this Act is really to create rights in favour of Harijans, and according to him that is a subject which does not find a place in any of the three Lists. Mr. Thakor has further argued that if item 1 in List III was to be interpreted in the manner in which we are doing, the result would be that the Legislature could legislate on any of the subjects not mentioned in List I and List II by merely creating a new offence and by including in the statute a penal clause. Now, it is well known that the whole scheme of the Government of India Act is to make all the three Lists exhaustive. Parliament did not follow the model of the American, the Australian, or the Canadian constitution. Its intention was to enumerate, as far as possible, all possible subjects of legislation and to include them in one of the three Lists. The residual S. 104 was not intended to be resorted to ordinarily. It was enacted merely for the purpose of emergency or in case some subject had been

overlooked by inadvertence. Therefore, there is nothing wrong in giving an interpretation to item 1 in List III which would enable the Provincial Legislature to pass legislation with regard to social reforms. The only way the Legislature can carry out social reforms is by punishing those who do not conform to the standards laid down by the Legislature. In this case the Legislature says the Harijans shall be treated as equal citizens with the Hindus, and if anyone does not conform to that, he shall be punished. Similarly, in other matters of social reform the Legislature may also impose penalties upon those who do not conform to the view taken by the Legislature.

[3] In our opinion, therefore, this particular Acts falls in item 1 of List III and it was competent to the Legislature to pass this piece of legislation. Therefore, the contention urged by the applicant must fail and we must discharge the rule.

[4] Certificate granted to go to the Federal Court.

D.H.

Rule discharged.

A. I. R. (36) 1949 Bombay 170 [C. N. 49.]

JAHAGIRDAR J.

Maruti Vithu Mule—Defendant—Applicant v. Ganpat Genu Dhamdhare—Plaintiff—Opposite Party.

Civil Revn. Appln. No. 452 of 1947, Decided on 27th February 1948, from order of Dist. Judge, Poona, in Civil Revn. Appln. No. 54 of 1946.

Bombay Agricultural Debtors Relief Act (XXVIII [28] of 1939), Ss. 85 and 86—Suit filed under S. 15D, Dekkhan Agriculturists' Relief Act (1879) for transaction entered into in 1884—Suit held governed by S. 86 and hence Dekkhan Agriculturists' Relief Act applied.

The plaintiff filed a suit for accounts in 1944 under S. 15D, Dekkhan Agriculturists' Relief Act, alleging that the transaction entered into 1884 though appearing to be a sale was in fact a mortgage:

Held that (1) the case fell not under S. 85 but under sub-cl. (a) of para. 1 of S. 86, Bombay Agricultural Debtors Relief Act, and the suit was therefore governed by Dekkhan Agriculturists' Relief Act. It could not be contended that the Act was deemed to be in force only for purpose of institution of suits. The further procedure after institution was also governed by the same Act.

[Para 4]

(2) The provisions of the Dekkhan Agriculturists' Relief Act could be availed of even for suits filed before the establishment of the Debt Adjustment Board.

[Para 5]

M. G. Chitale—for Applicant.

V. D. Tulzapurkar—for Opposite Party No. 1.

Order.—These two revision applications raise some interesting points under the Bombay Agricultural Debtors Relief Act. The facts leading to the suits out of which these applications arise are these.

[2] The plaintiff filed two suits Nos. 9 and 10 of 1944 in the Court of the Civil Judge (Junior Division) at Ghodnadi in the Poona District for accounts alleging that the transaction of 18th August 1884, though appearing to be a sale was in fact a mortgage. The two suits were under S. 15D, Dekkhan Agriculturists' Relief Act. On 1st May 1945, a Debt Adjustment Board was established for that taluka. On 12th July 1945, the plaintiff passed a purshis that he was a debtor and his debts were less than Rs. 15,000 and prayed that the suits may be transferred to the Debt Adjustment Board. The trial Court, however, asked the plaintiff in each case to get a declaration by the Board that he was a debtor and adjourned the hearing of the suit. The plaintiff realising that the Bombay Agricultural Debtors Relief Act would not apply to a transaction of 1884, filed another purshis on 25th July 1945, stating that the suit may be proceeded with under the Dekkhan Agriculturists' Relief Act as the Bombay Agricultural Debtors Relief Act did not apply to the particular transaction in question. On 11th January 1946, the suit came on for hearing. At that time the defendant applied stating that under S. 85 (1), Bombay Agricultural Debtors Relief Act, the Dekkhan Agriculturists' Relief Act ceased to have any force in that area and consequently S. 10A, Dekkhan Agriculturists' Relief Act, would not apply to the hearing of such a suit. He, therefore, urged that the plaintiff should not be allowed to lead oral evidence to prove that the transaction of 1884 was a mortgage. The trial Court allowed the application and held, relying upon S. 85 (1), Bombay Agricultural Debtors Relief Act, that the Dekkhan Agriculturists' Relief Act ceased to have any force in that area and that S. 10A would not apply. Against this order the plaintiffs went in revision to the District Court at Poona. The learned District Judge held that the suits were really governed by S. 86, Bombay Agricultural Debtors Relief Act, and that they continue to be governed by the Dekkhan Agriculturists' Relief Act and remanded the suits to the trial Court to be heard and disposed of according to law. The defendant being aggrieved by the orders in the revision applications, has come in revision.

[2a] Mr. Chitale, the learned advocate for the defendant, contends that the learned District Judge had misread ss. 85 and 86, Bombay Agricultural Debtors Relief Act. It is the contention of Mr. Chitale that on the date, viz., 1st May 1945, when the Debt Adjustment Board was established, the Dekkhan Agriculturists' Relief Act would cease to have any force under S. 85, Bombay Agricultural Debtors Relief Act, and consequently the Dekkhan Agriculturists' Relief Act would not govern such a suit. And secondly his

contention is that S. 86 would not save such a suit because S. 86 provides that Dekkhan Agriculturists' Relief Act would remain in force *only for the purpose of institution of suits* for a period of three years from the aforesaid date and according to his contention the further procedure must be under the ordinary law, and lastly he says that as the present suit was not filed between 1st May 1945 and 1st May 1948, sub-cl. (b), para. 2 of S. 86 would not govern such a suit.

[3] It is true that under S. 85 it is provided:

"On the date on which a Board is established under S. 4 for any local area . . . the Dekkhan Agriculturists' Relief Act, 1879, shall cease to have force in such area."

It must, therefore, be conceded that by virtue of S. 85 of the Bombay Agricultural Debtors Relief Act the Dekkhan Agriculturists' Relief Act would cease to have any operation from the date on which the Debt Adjustment Board was established. But an exception to that has been provided by S. 86. Section 86 reads as follows:

"In respect of transactions entered into before the date on which a Board is established for any local area (hereinafter referred to in this section as the aforesaid date), by or with:

(a) debtors in respect of whose debts no application can be made under S. 17 of this Act, or

(b) persons who are not debtors, the Dekkhan Agriculturists' Relief Act, 1879, shall, notwithstanding anything contained in S. 85 of this Act, be deemed to remain in force in such area:

(a) for purposes of institution of suits for a period of three years from the aforesaid date,

(b) for purposes of any proceedings arising in or out of suits instituted before the expiry of the period of three years from the aforesaid date until such proceedings are terminated."

[4] Now, according to the view of the District Court, the present suits would be governed by S. 86 because they were with regard to a transaction entered into before 1945 by a debtor in respect of whose debts no applications could have been made under S. 17 of the Act. Under S. 17, an application for adjustment of debts has got to be made within 18 months from the date on which a Board is established under S. 4. But under S. 45, this remedy can be availed of only in respect of a transaction entered into after 1st January 1927. Now, admittedly the transaction in suit was of 1884. Therefore, no application could have been made under S. 17. The present case clearly falls under sub-cl. (a) of para. (1) of S. 86, and it is for purposes of such transactions that this provision is made, viz., that the Dekkhan Agriculturists' Relief Act would be deemed to remain in force. Sub clause (a), para. 2 does not really apply to the present case as the suits had been instituted before even the Debt Adjustment Board was established. But it is contended that the Dekkhan Agriculturists' Relief Act is deemed to be in force *only for purposes of institution of suits* and the further procedure would be under the

ordinary law and that S. 10A of the Dekkhan Agriculturists' Relief Act would not apply. I find it difficult to accept this contention. In my opinion, S. 86 provides that the Dekkhan Agriculturists' Relief Act will remain in force for a period of three years from the date on which a Board is established for any local area for the purpose of institution of suits in respect of transactions about which no application can be made under S. 17 and that it will continue in force until the suits instituted before the expiry of the period of three years from the aforesaid date and the proceedings arising in and out of the said suits terminate. But if Mr. Chitale's contention is accepted, then the whole purpose of this proviso would be nullified. Now, according to Mr. Chitale a suit for accounts can be filed under the Dekkhan Agriculturists' Relief Act within three years from the establishment of the Debt Adjustment Board. But that cannot be tried under the Dekkhan Agriculturists' Relief Act at all. In my view, such a construction would be unreasonable. The words "any proceedings" must be understood to mean the hearing and the procedure of the suit as well as proceedings arising in or out of the suits.

[5] The last contention raised by Mr. Chitale is that the provisions of the Dekkhan Agriculturists' Relief Act may be availed of, if at all, by persons who file suits between the date of the establishment of the Debt Adjustment Board and three years therefrom, but the procedure laid down in the Dekkhan Agriculturists' Relief Act cannot be availed of for suits which are filed before the establishment of the Debt Adjustment Board. I am afraid I am not prepared to accept this contention either. The emphasis really is on the word "before" and not on the word "from." The three years are to be calculated no doubt from the date of the establishment of the Debt Adjustment Board, and the procedure laid down in the Dekkhan Agriculturists' Relief Act will be availed of for all suits which are filed before the expiry of three years from the date of the establishment of the Board, including suits which are filed before the establishment of the Board. If the contention of Mr. Chitale is accepted, it would mean that no provision has been made in this Act for the purposes of suits which are filed under the Dekkhan Agriculturists' Relief Act before the date of the establishment of the Debt Adjustment Board. I, therefore, hold that the procedure laid down under the Dekkhan Agriculturists' Relief Act can be availed of by the plaintiff in both these suits.

[6] The applications, therefore, fail and the rule is discharged with costs in each case.

D.H.

Rule discharged.

A. I. R. (36) 1949 Bombay 172 [C. N. 50.]

CHAGLA C. J. AND TENDOLKAR J.

In re P. D. Shamdasani—Petitioner.

Criminal Appln. Revn. No. 983 of 1948, Decided on 29th September 1948, from order of Resident Magistrate at Amalner.

Criminal P. C. (1898), S. 526 (8) — Application for adjournment should be made in person or through advocate—Intimation by post or telegram that party wants to move High Court for transfer of case, is not proper way — Magistrate is not bound to act upon it.

Section 526 (8) itself contemplates the presence of the party or his advocate when the application for adjournment is made under that sub-section, because that sub-section confers upon the Court a discretion before granting the adjournment to require a bond to be executed by the party making the application in order to ensure that such an application would be made within a reasonable time to be fixed by the Court. [Para 2]

The proper way to approach the Court for an adjournment is not by sending letters and telegrams to the presiding officer. The party must either appear in person before the Court or he must make such application as he wishes to make by a properly authorised agent. It would be impossible for a Court to carry on its business if it were to accede to applications made by posts or by telegrams. In the first place there would be no guarantee that the letters or telegrams really emanated from the person who purported to send them, and in the second place, a certain amount of formality and solemnity is essential in Courts of law. Intimation by post or by telegram that party wants to move the High Court for transfer of the case therefore is not a proper intimation under S. 526 (8), and the Magistrate is not bound to act upon it and adjourn the hearing.

[Para 2]

Annotation: ('46-Com.) Criminal P.C., S. 526, N. 6, 19.

Y. B. Rege and M. W. Pradhan—for Petitioner.

Asstt. Government Pleader—for the Crown.

Chagla C. J.—This is an application in revision against three orders made by the Resident Magistrate, First Class, Amalner. The application was made in the first instance to the Sessions Judge, East Khandesh, and he having confirmed these three orders the petitioner has now come to us.

[2] The petitioner filed a complaint under S. 282A, Companies Act, S. 409, Penal Code, and ss. 109 and 114 read with S. 34, Penal Code, against the opponents. Opponents No. 1 are the managing agents and opponents Nos. 2 to 9 are the directors of the Pratap Spinning, Weaving and Manufacturing Co., Ltd., Amalner. The case went on against the opponents, and on 10th January 1947, the petitioner, who is a shareholder of the company, made an application under S. 347, Criminal P. C., that the case of the opponents should be committed to Sessions. On 29th March 1947, the learned Magistrate made an order that this application would be argued after the prosecution case had been completed, and on 30th September 1947, the learned Magistrate made an order after the prosecution case was completed and all the evidence had been led that

the arguments on the application made by the petitioner on 10th January 1947, would be heard on 26th September 1947, and the learned Magistrate fixed the exact time when the case would be taken up which was from 1 p.m. to 2-30 p.m. for hearing argument by the complainant and from 2-30 p.m. to 4 0 p.m. for hearing argument by the defence. The order further states that no adjournment on any account would be given to either party as the learned Magistrate was going on leave from 1st October 1947, preparatory to retirement and he wanted to deliver judgment before that date. On 24th September 1947, the petitioner sent a letter by express postal delivery to the learned Magistrate requesting him to grant him a fortnight's adjournment as he wanted to file the next day before the High Court a transfer application under S. 526, Criminal P. C. On the next day he sent a telegram informing the Magistrate that he had filed such an application. On 26th September 1947, when the case reached before the Magistrate, the petitioner was not present and the learned Magistrate passed an order rejecting the petitioner's application for adjournment. That is the first order against which this revision application is filed, and the contention of the petitioner is that as soon as he gave intimation to the learned Magistrate of his intention to make an application for transfer it was incumbent upon the learned Magistrate to adjourn the case as required by S. 526 (8), Criminal P. C. Now the first question that we have to consider is whether there was any intimation to the Court as required by that sub-section. In our opinion, the proper way to approach the Court is not by sending letters and telegrams to the presiding officer. The party must either appear in person before the Court or he must make such application as he wishes to make by a properly authorised agent. It would be impossible for a Court to carry on its business if it were to accede to applications made by posts or by telegrams. In the first place there would be no guarantee that the letters or telegrams really emanated from the person who purported to send them, and in the second place, a certain amount of formality and solemnity is essential in Courts of law and in our opinion it is very improper for the parties to send letters or telegrams to presiding officers of the Court. Further in our opinion, S. 526 (8) itself contemplates the presence of the party or his advocate when the application for adjournment is made under that sub-section, because that sub-section confers upon the Court a discretion before granting the adjournment to require a bond to be executed by the party making the application in order to ensure that such an application would be made within a reasonable

time to be fixed by the Court. Therefore, if the Court was inclined to grant the adjournment on the party executing such a bond, it would have been impossible for the Court to do so if the application was made in the absence of a party or his lawyer. Therefore, in our opinion, as there was no proper intimation given to the Court under S. 526 (S), the learned Magistrate was not bound to adjourn the case as required by that sub-section. Further, the learned Magistrate had given a clear intimation by his order of 23rd September 1947, that the case would be heard on 26th September 1947, and in no event would an adjournment be granted. The petitioner had notice of that order and it was his duty to be present in Court on that day.

[3] It has been argued by the petitioner that in any event when the Court received the intimation by telegram that the application for transfer had in fact been filed, he should not have proceeded with the case. This argument suffers from the same infirmity as the first one, because here again the Magistrate was not bound to act on information conveyed to him by a telegram purported to have been sent by the petitioner. The position might have been different if the telegram had been sent by the Registrar of this Court or some responsible officer.

[Their Lordships considered the merits of the application and concluded:] Under the circumstances we are of the opinion that the learned Magistrate was right in refusing the application for adjournment of the petitioner, and in refusing the application under S. 347, Criminal P. C., and also in passing the order of discharge. The petition, therefore, fails and is dismissed. The rule is, therefore, discharged.

R.G.D.

Rule discharged.

A. I. R. (36) 1949 Bombay 173 [C. N. 51.]

WESTON J.

Ralph Hugh Friedlander — Applicant v. Kathleen Marjorie Friedlander — Opposite Party.

Suit No. 1193 of 1932, Decided on 30th August 1948.

Divorce Act (1869), S. 62 — Rules under, framed by Bombay High Court — R. 928 is *ultra vires* — Court has power to modify or discharge order for alimony notwithstanding wife's absence from India.

Rules made under S. 62 must be consistent with the provisions of the Act and any rule which deprives a person of a remedy which exists under the Act is to that extent *ultra vires*. Rule 928 (appearing at p. 220 of the printed Rules) prohibiting High Court from entertaining application for the modification or discharge of the order of alimony etc. unless the person on whose petition the decree was pronounced was at the time of the petition resident in India is *ultra vires* the rule making power of Bombay High Court under S. 62 and the Court has jurisdiction to modify or discharge an order for alimony notwithstanding the fact that the wife on

whose petition the decree was pronounced is resident outside India. (1931) P. 116 and 1939-2 All E. R. 387, *Ref.* [Para 11]

K. J. Khandalawala — for Applicant.

J. C. Forbes — for Opposite Party.

Order. — This matter raises a question as to the validity of a part of one of the Rules framed in the year 1929 by this Court under S. 62, Indian Divorce Act, 1869. The impugned rule is R. 928 appearing at p. 220 of the printed Rules of this Court, and the material part of it is as follows :

"The High Court shall not entertain an application for the modification or discharge of an order for alimony, maintenance or the custody of children, unless the person on whose petition the decree was pronounced is at the time the application is made resident in India."

[2] The facts of the present matter shortly are these. On 30th June 1933, on petition of the present opponent, to whom it will be convenient to refer as the wife, a decree absolute for dissolution of marriage was passed by this Court under the Indian Divorce Act against the present applicant, to whom I will refer as the husband. By later order made on 14th July 1933, the husband was ordered to pay permanent alimony to the wife of an amount of Rs. 75 a month, and a further sum of Rs. 25 a month as maintenance of the daughter of the marriage until this daughter should attain the age of 18 years. Custody of the daughter was with the wife. I am informed that the husband was not represented when the order of 14th July 1933, was made, and no 'dum sola' clause appears in the order. It is not disputed that the wife had left India before the application for alimony and maintenance was filed, that sometime afterwards she re-married and has since lived with her second husband in England. The present applicant, the prior husband, has also remarried and all along has remained in India. In the year 1942, he made an application for setting aside the order of alimony and maintenance, made in the year 1933, on the ground that he was no longer able to pay, as in addition to his second wife he was now required to support his destitute parents, while his first wife's husband was in a position to support her, and also on the ground that the order of 14th July 1933, was void as it was made in contravention of S. 2, Indian Divorce Act, which provides, *inter alia*, that no relief shall be granted under the Act other than a decree for dissolution of marriage or of nullity of marriage, except when the petitioner resides in India at the time of presenting the petition. This application was opposed by the wife, who admitted that her present husband was in a position to support her and was supporting her, but who claimed that the maintenance awarded for the daughter was inadequate and that she devoted all she received

under the order to the maintenance to the daughter.

[3] The application was dismissed on 21st February 1944. Rule 928 was then relied upon by the husband in support of his argument under S. 2 of the Act. In my order I expressed doubt as to the validity of R. 928, but held the order of 14th July 1933, to be valid notwithstanding S. 2 of the Act, on the basis that an order for alimony and maintenance must be regarded as incidental to the decree for dissolution of marriage, which could be granted under S. 2, even though the wife had already left India when the original petition was filed. I declined to consider modification of the order in view of the wife's statement that she devoted all she received to the daughter's increasing expenditure, but said it would be open to the husband to ask that the order be revised when the daughter attained the age of 18 years.

[4] The present application made on 10th February 1948, now asks for such review as the daughter attained the age of 18 years in March 1947. The order for payment of Rs. 25 a month for the daughter of course has lapsed under the terms of the order itself, and the question is whether the order for alimony can and should be reviewed. Any modification of the order is opposed on behalf of the wife. It is claimed that certain expenses still have to be met for the daughter which the wife proposes to meet from the alimony payable to her. She claims therefore that this should not be reduced. In her turn, she now relies upon R. 928 and claims that in her absence from India the order cannot be varied.

[5] In England doubts as to the power to vary a maintenance order were settled by the decisions in *Turk v. Turk* : *Duffy v. Duffy* (1931) P. 116 : (100 L. J. P. 90) in 1931 and *Bennet v. Bennet* (1939) P. 274 : (1939-2 ALL E. R. 387) in 1934, and the power is now provided by S. 14, Administration of Justice (Miscellaneous Provisions) Act, 1938, and this power is not affected by the circumstance that the wife may no longer be resident in England. Section 37, Indian Divorce Act, provides in terms for discharge or variation of orders of maintenance. Under S. 2 of the Indian Act the Court has jurisdiction to grant a decree for dissolution of marriage even when the petitioner is not resident in India when the petition is presented, and if, as I have held in earlier proceedings, the section does not bar the making of incidental orders for alimony or maintenance in such circumstances, it is difficult to understand that present residence can affect the power to discharge or vary such orders expressly given by S. 37.

[6] Comparison of R. 928 with R. 22 of the Indian (Non-Domiciled Parties) Divorce Rules 1927, framed by the Secretary of State in Council

of India under S. 1 (4), Indian and Colonial Divorce Jurisdiction Act, 1926, suggested that R. 928 was based upon this rule rather than upon considerations arising from S. 2, Indian Divorce Act. Reference to the original draft of the rules made by this Court in the year 1929 has confirmed this, for I find that the original draft of R. 928 was identical in wording with R. 22, Secretary of State's Rules, and that R. 928 and the other rules then framed were framed with the expressed intention of being in conformity with the rules framed by the Secretary of State under the Indian and Colonial Divorce Jurisdiction Act.

[7] With the greatest respect to the learned Judges responsible for R. 928, it does not seem to have been considered that, at least and so far as decrees for dissolution or nullity of marriage are concerned, jurisdiction of the Indian Courts is fundamentally different under the two Acts, the Indian and Colonial Divorce Jurisdiction Act and the Indian Divorce Act. Under each Act such jurisdiction is based upon domicile, English under the one, and Indian under the other; and as a person can have only one domicile at a particular time, jurisdiction under the two Acts in these matters is mutually exclusive. It is also to be noticed that although the Indian Divorce Act applies in terms where the petitioner or the respondent professes the Christian religion, the Act also applies by reason of S. 17, Special Marriage Act, to marriages under that Act when neither of the parties professes the Christian religion. Where jurisdiction exists under the Indian Divorce Act in a particular case to grant a decree of dissolution of marriage, clearly no jurisdiction exists in that case at the same time under the Indian and Colonial Divorce Jurisdiction Act, nor could jurisdiction exist in the Courts in England, for there also jurisdiction depends upon domicile. Also no English or other foreign Court can have jurisdiction to vary any order made by an Indian Court under the Indian Divorce Act, although some independent order in separate proceedings consequent upon change of domicile might be made. On the other hand, in cases falling under the Indian and Colonial Act the English Courts have concurrent jurisdiction. The jurisdiction of the Indian Courts under the Indian and Colonial Act is really of the nature of a delegated jurisdiction. By S. 1 (2), Indian and Colonial Divorce Act, a decree made under the Act must be registered in the High Court in England (or in the books of Council Session in Scotland) and by S. 1 (3) of the same Act, where a decree is so registered, proceedings under it may be taken as if it is a decree made by the High Court of England (or the Court of Session in Scotland). Then follow three provisos to S. 1 (3). The second gives to the Court of Session

power to vary or discharge an order of alimony. The third saves proceedings taken in India under the decree. The first proviso is akin to R. 928 and R. 22, Secretary of State's Rules and is as follows :

"(1) The High Court in England or the Court of Session in Scotland shall not, unless the Court for special reasons sees fit so to do, entertain any application for the modification or discharge of any such order if and so long as the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India."

Section 1 (a) of the same Act confers power upon the Secretary of State in Council of India to make rules, and states that these rules shall provide for matters there set out in a number of clauses. Of these cl. (e) is as follows :

"(e) for limiting cases in which applications for the modification or discharge of an order may be entertained by the Court to cases where at the time the application is made the person on whose petition the decree for the dissolution of the marriage was pronounced is resident in India."

Rule 22 of Secretary of State's Rules clearly was framed under this clause. The effect of this rule and the first proviso to S. 1 (3), set out above is that an application for modification or discharge of an order of alimony made under a decree for dissolution of marriage granted by an Indian Court under the Indian and Colonial Act must be made to the Indian Court, if at the time the application is made the person on whose petition the decree was pronounced is resident in India, and to the High Court in England (or the Court of Session in Scotland) if at the time the application is made the person on whose petition the decree was pronounced is resident anywhere outside India.

[8] There is, however, no counterpart to R. 928 of this Court, and its effect, if valid, would be that if the person on whose petition the decree was pronounced leaves India, no Court has jurisdiction to modify or discharge an order for alimony or for maintenance or for custody of children made under the Indian Divorce Act.

[9] As already stated, express power to discharge or modify orders of alimony is granted by S. 37, Indian Divorce Act, and S. 44 of that Act provides expressly that from time to time orders may be made for custody, maintenance and education of minor children, the marriage of whose parents was the subject of the decree. It is an illustration sufficiently striking of the effect of R. 928 that if a person to whom custody of minor children has been awarded leaves India and abandons the children in India the Court might be powerless to act.

[10] It is true that in the rules framed by the Secretary of State under the Indian and Colonial Act there is reference to the Indian Divorce Act and that in the Indian Divorce Act there is re-

ference to the practice of the Divorce Courts in England. In R. 22 of the Secretary of State's Rules it is provided that :

"Proceedings relating to alimony, maintenance, custody of children, and to the payment, application or settlement of damages assessed by the Court shall be conducted in accordance with the provisions of the Indian Divorce Act, 1869, and of the rules made thereunder." and that part of R. 22 earlier referred to follows as a proviso.

[11] Conversely S. 7, Indian Divorce Act, enjoins that Courts shall act and give relief in all suits and proceedings under the Act on principles and rules which are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief. It has been held recently by this Court in appeal *Ramesh Saraiya v. Kusum Madgao-kar*, 50 Bom. L. R. 426 : (A.I.R. (36) 1949 Bom. 1) that this section does not apply only to matters of procedure and operates to give jurisdiction to order alimony following a decree of nullity of marriage, although no provision for alimony in such circumstances is made in the Act. This construction of S. 7 would seem to make much of the remainder of the Act surplusage. But even so, the fundamental difference of jurisdiction under the Indian and Colonial Act and under the Indian Act remains unaffected. Rules made under S. 62, Indian Divorce Act, must be consistent with the provisions of the Act, and any rule which deprives a person of a remedy which exists under the Act is to that extent *ultra vires*. On these considerations I hold that the material part of R. 928, namely, that contained in its para. 1 as set out at the beginning of this judgment is *ultra vires* the rule making power of this Court under S. 62 of the Act, and is, therefore, of no effect. I hold, therefore, that I have jurisdiction to modify or discharge the order for alimony in this case, notwithstanding the fact that the wife on whose petition the decree was pronounced is resident outside India.

[12] On the merits of the application it appears that the incomes of the husband and of the wife's second husband are of about the same order. There is no reason to doubt the husband's assertion that he has now to support his parents. At the same time the daughter, although she has attained the age of 18 years, is said still to be a dependent, as she has not finished her education, and I think some amount should continue to be paid to the wife to be devoted to the daughter. Considering all the circumstances I think it will be proper to substitute for the order of 14th July 1933, an order directing that the husband from the date of this application shall pay to the wife an amount of Rs. 25 only a month and that this

payment shall be continued until the daughter has attained the age of 21 years.

[19] The husband applicant must bear the costs of the wife in this present proceeding. Counsel certified.

D.H.

Order accordingly.

A. I. R. (36) 1949 Bombay 176 [C. N. 52.]

CHAGLA C. J. AND TENDOLKAR J.

Commissioner of Income-tax Central, Bombay v. N. M. Raiji — Assessee.

Income-tax Ref. No. 4 of 1948, Decided on 22nd September 1948.

Income-tax Act (1922), Ss. 16 and 25 (4) — Partnership dissolved — Firm not charged to tax by reason of S. 25 (4) in respect of share of assessee partner—Amount of share not to be included in total income of assessee for ascertaining rate of income-tax applicable.

The scheme of the Income-tax Act is that wherever one finds an exemption or exclusion from payment of tax, the exemption and exclusion also operates for the purpose of computing the total income. Not only is the sum not liable to tax, but it is also not to form part of the total income for the purpose of determining the rate. When the Legislature intends that certain sums although not liable to tax, should be included in the total income, it expressly so provides, as it is done in S. 16, and therefore, *prima facie* when one comes to S. 25 (4) and finds that the assessee is not liable to pay tax on the sum received by him as his share of the partnership, that sum cannot and does not form part of his total income. [Para 3]

The assessee *R* was a partner in the firm of S. B. from 1928 onwards. The partnership was dissolved, as a result of a consent decree passed by the High Court of Bombay, as from 9th October 1942 and *R* ceased to be a partner from that date. In the assessment of the assessee for the year 1943-1944 he showed as his personal income Rs. 6,535. As a result of the consent decree, the share of the assessee in the firm from 1st January 1942, to 9th October 1942, was determined at Rs. 41,000. By reason of S. 25 (4), Income-tax Act, the firm of S. B. was not charged to any tax in respect of the period 1st January 1942 to 9th October 1942 :

Held, that the share of the profit of the assessee in the firm of S. B. in the accounting year 1942 could not be included in the total income of the assessee for ascertaining the rate of income-tax. [Para 3]

Annotation : ('46-Man.) Income-tax Act, S. 25 N. 4.

G. N. Joshi — for Commissioner of Income-tax.

R. J. Kolah — for Assessee.

FACTS. — The following questions of law were referred to the High Court under S. 66 (1), Income-tax Act, 1922 :

(i) Whether the shares of profit of the assessee in firm of Messrs. S. B. Billimoria & Co. in the accounting year 1942 should be included in the total income of the assessee for ascertaining the rate of income-tax applicable ?

(ii) If so, whether such share should be taken at the sum of Rs. 41,000 (or Rs. 28,684) ?

(iii) Whether so far as super-tax assessment is concerned the correct figure of share of income to be added both for assessment and rate purposes of Rs. 41,000 or Rs. 28,684 ?

[2] **Chagla C. J.** — The assessee Mr. N. M. Raiji was a partner in the firm of S. B. Billimoria & Co. from 1928 onwards. The partnership was dissolved, as a result of a consent decree passed by the High Court of Bombay, as from 9th October 1942, and Raiji ceased to be a partner from that date. In the assessment of the assessee for the year 1943-1944, he showed as his personal income Rs. 6535. As a result of the consent decree, the share of the assessee in the firm from 1st January 1942, to 9th October 1942, was determined at Rs. 41,000. By reason of S. 25 (4), Income-tax Act, the firm of S. B. Billimoria & Co. was not charged to any tax in respect of the period 1st January 1942 to 9th October 1942, and the Department concedes that on the sum of Rs. 41,000 received by Mr. Raiji no tax is payable. But what the Department contends is that the sum of Rs. 41,000 must be included in the total income of Mr. Raiji for the assessment year 1943-1944 in order to determine the rate at which income-tax is payable by him. That is the first question that is submitted to us and which we have to decide.

[3] Now, the scheme of the Income-tax Act is that income, profits and gains of an assessee are liable to tax subject to certain exemptions and exceptions. Although certain sums may be exempted from taxation, still they may form part of the total income of an assessee in order to determine the rate at which income-tax is payable. Therefore, it follows that the total income of an assessee is not necessarily wholly subject to tax. Portions of it may be exempt from taxation and yet may be computed for the purpose of determining the rate at which tax is payable. Mr. Joshi's contention is that all sums which are exempted from taxation must still be brought into the total income of the assessee for the purpose of determining the rate at which income-tax is payable, except where the statute in terms excludes these sums from the total income of the assessee. It is pointed out that in S. 4, sub-s. (3), certain incomes, profits or gains falling within the classes mentioned in that sub-section are not to be included in the total income of the person receiving the income, and Mr. Joshi argues that except in these cases, in every other case, although the tax is not payable on certain sums, they must be included in the total income for the purpose of determining the rate. It is, therefore, argued that although under S. 25(4) an exemption is given to the assessee because there is a succession to the business carried on and no tax is payable by the assessee, the sum which is exempted under this sub-section does form part of the total income for the purpose of determining the rate. Total income is defined in S. 2 (15) of the Act, and it means total amount

of income, profits and gains computed in the manner laid down in this Act. Therefore, it would be erroneous to suggest that total income is to be determined only in the light of S. 4, sub-s. (3) of the Act. How total income is to be computed and determined depends upon the various provisions contained in the Act as a whole. Then we might look at various sections which provide for exemptions from the payment of tax. There is S. 7 which contains various provisos which cover sums not liable to tax. Similarly S. 8. Section 14 also contains exemptions with regard to certain sums on which no tax is payable, and S. 15 contains exemptions in cases of life insurance. It will be noticed that the language used in all these sections, to which I have referred, is similar, if not identical with the language used in S. 25 (4), viz., that the tax is not payable on these different sums. Now, if Mr. Joshi's contention was sound, then with regard to these various exemptions which I have enumerated, although tax is not payable, they should all be included in the total income for the purpose of determining the rate payable in respect of income-tax. Now, the short and conclusive answer to that contention is S. 16, Income-tax Act. It is that section which in terms includes in the total income of an assessee only certain sums which are exempted from the payment of tax. Therefore, by implication, where the sums are not included in the total income by S. 16, those sums are not only exempted from the payment of tax, but they are also excluded from the total income. Now, when we look at S. 16, it does not include the sum covered by S. 25 (4) as a sum which is to be included in the total income of the assessee. The scheme, therefore, of the Income-tax Act is clear and is very different from what Mr. Joshi suggests it is. The scheme is that wherever one finds an exemption or exclusion from payment of tax, the exemption and exclusion also operates for the purpose of computing the total income. Not only is the sum not liable to tax, but it is also not to form part of the total income for the purpose of determining the rate. When the Legislature intends that certain sums, although not liable to tax, should be included in the total income, it expressly so provides, as it is done in S. 16, and, therefore, *prima facie* when we come to S. 25 (4) and when we find that the assessee is not liable to pay tax on the sum received by him as his share of the partnership, that sum cannot and does not form part of his total income. Mr. Joshi has not succeeded in pointing out to us any provision in the Act whereby this particular sum covered by S. 25 (4) has been made a part of the total income of the assessee. Therefore, in my opinion, the share of the profit

of the assessee in the firm of S. B. Billimoria & Co. in the accounting year 1942 cannot be included in the total income of the assessee for ascertaining the rate of income tax.

[4] The other question to be considered is whether the assessee is liable to pay any super-tax in respect of his share in the partnership. Under the proviso to sub-s. (4) of S. 25, it is expressly provided that sub-ss. (3) and (4) shall not apply to super-tax except where the income, profits and gains of the business, profession or vocation were assessed to super-tax for the first time either for the year beginning on 1st April 1920, or for the year beginning on 1st April 1921. It is not disputed that the income, profits and gains of this partnership were not assessed to super-tax on 1st April 1940, or for the year beginning on 1st April 1941, and therefore, apart from anything else, as the proviso stands, there would be a liability upon the assessee to pay super-tax. Mr. Kolah has attempted to raise a very ingenious and a very interesting argument that there is no liability whatever on the assessee to pay any super-tax whatsoever. I am afraid, it is not open to Mr. Kolah to raise that contention in view of the form in which the question has been raised for our determination. The question that we have to answer is whether so far as super-tax assessment is concerned the correct figure of share of income to be added both for assessment and rate purposes is Rs. 41,000 or Rs. 28,684. The very question assumes and admits that there is a liability on the assessee to pay super-tax. The only question which is in dispute is on what amount super-tax should be paid, and therefore, however interesting the question may be, we refuse to be drawn into a controversy as to the correct position in law as to the liability of the assessee to pay any super-tax. The dispute as to the two amounts arises in this way. According to the partnership deed, the share of the assessee at the date of the dissolution would have amounted to Rs. 28,686. In fact, under the consent decree passed in this Court, he received Rs. 41,000. It is difficult to understand how the sum of Rs. 28,686 is in any way material or relevant when in fact, and as his share in the partnership, the assessee received Rs. 41,000. Mr. Kolah has tried to suggest that Rs. 41,000 may have been made up of his share as mentioned in the partnership deed, plus amounts for other considerations. But that was not the case of the assessee before the Tribunal, nor is there any finding to the effect that Rs. 41,000 represents anything less than the share of the assessee in the partnership. Under the circumstances, if the assessee is liable to pay super-tax—and, as I have pointed out, that is not disputed on this reference—then the super-

tax that he has got to pay is not on Rs. 28,686 but on Rs. 41,000.

[5] I would, therefore, answer the questions as follows: (i) In the negative. (ii) Does not arise. (iii) Rs. 41,000. There will be no orders as to costs in the reference. No order on the motion. No order as to costs.

Tendolkar J.—I agree.

D.H.

Answers accordingly.

A. I. R. (36) 1949 Bombay 178 [C. N. 53.]

CHAGLA C. J. AND TENDOLKAR J.

Sarupchand Hukumchand, a Firm — Assessee v. Commissioner of Income-tax.

Income-tax Ref. No. 1 of 1948, Decided on 21st September 1948.

(a) Income-tax Act (1922), S. 5 (5)—Power under, given to Commissioner of Income-tax is exercisable more than once.

The power given to the Commissioner of Income-tax by S. 5 (5) to allocate or distribute the work with regard to the assessee is not exhausted once he does so. Having once exercised the power he can again allocate or distribute the work from one officer to another.

[Para 9]

Annotation: ('46-Man.) Income-tax Act, S. 5 N. 2.

(b) Income-tax Act (1922), S. 5 (7-A)—Law before enactment of sub-s. (7-A) — Case transferred from one Income-tax Officer to another — Re-issue of notice not necessary.

From the enactment of the provision of S. 5, sub-s. (7-A), incorporated in 1940, it cannot be held that re-issue of notice was necessary before this amendment when a case was transferred from one Income-tax Officer to another. It must be established that in fact under the law as it existed before this enactment the re-issue of notice was incumbent and necessary. Under the old law no such fresh notice was necessary.

[Paras 10 and 11]

(c) Income-tax Act (1922), S. 4 (2) (before 1939) — Income-tax authorities are empowered to take into consideration income, profits and gains including losses of any year preceding previous year relevant to assessment year.

Under the old S. 4 (2), what was taxable was not income, profits and gains, but the remittances, and for the purposes of remittances the relevant year was "previous year." But there is no reason why for the purposes of income, profits and gains the relevant years should be the "previous years." Any income, profits or gains whether earned in the previous year or years prior thereto would become taxable provided they were remitted in the "previous year" and therefore it cannot be stated that the income-tax authorities are precluded by law from considering the true state of affairs by looking into the financial position of the assessee of the years prior to the previous year.

Hence under S. 4 (2) of the old Act the income-tax authorities are empowered to take into consideration the income, profits and gains, including losses, of any year preceding the "previous year" relevant to the assessment year.

[Para 13]

R. J. Kolah and Sir Jamshedji Kanga —

for Assessee.

G. N. Joshi — for Commissioner of Income-tax.

FACTS.—This was a reference under S. 66 (1), Income-tax Act, 1922, of the assessee Sarupchand

Hukumchand. The assessment year was 1936-37 and the year of account was Maru year 1991-92 ending on 27th October 1935. The assessee was an unregistered firm of two partners. The firm at the material time was the managing agents of Hukumchand Mills of Indore and carried on extensive business in cloth and money-lending at Indore as well as in Calcutta and Bombay in British India. The assessee made a return of its total income on 27th August 1936, to the Income-tax Officer, Special Circle, Bombay. The assessment was pending on 1st April 1939, when the Income-tax (Amendment) Act of 1939 came into force. Under S. 5 (2), Income-tax Act, as amended, the Central Government appointed a Commissioner of Income-tax (Central), (Headquarters Bombay) without reference to area. The Central Board of Revenue in exercise of the powers conferred by S. 5 (2) assigned on 18th April 1939, to the Commissioner of Income-tax (Central) the assessee's case. The Commissioner of Income-tax (Central) allotted under S. 5 (5) the assessee's case to the Income-tax Officer (Central), Section VI, on 27th April 1939. On 14th October 1939, the Commissioner of Income-tax (Central) allotted under S. 5 (5) the assessee's case to the Income-tax Officer (Central), Section VII. The assessment was completed by the Income-tax Officer (Central), Section VII. On these facts the assessee contended before the Tribunal that the assessment made on it was invalid on the grounds (i) that the Income-tax Officer (Central) Section VII had no jurisdiction in respect of the assessee's case and (ii) that the Commissioner of Income-tax (Central), did not have the power to transfer the assessee's case from the Income-tax Officer (Central), Section VI to the Income-tax Officer (Central), Section VII. These contentions of the assessee were not accepted by the Appellate Tribunal. It was also contended before the Appellate Tribunal that the Income-tax Officer (Central), Section VII, could not complete the assessment without issuing a fresh notice under S. 22 (2), Income-tax Act. This contention was also not accepted by the Appellate Tribunal.

[2] One of the questions that the Appellate Tribunal had to determine related to the remittances from Indore to Bombay. No finding as to the residence of the assessee was given either by the Income-tax Officer or the Appellate Assistant Commissioner. The assessment for the year 1935-36 was before the High Court of Judicature at Bombay: *In re Sarupchand Hukumchand*, 47 Bom. L. R. 159: (A. I. R. (32) 1945 Bom. 258). The question about the residence of the assessee was raised before the High Court. The High Court by its order dated 21st September 1942, directed the Commissioner of Income-tax to report on the question relating to the residence of the assessee firm in the account year 1990-91

Maru year. On 11th February 1944, the Commissioner found that the assessee was a resident firm. After hearing counsel, the High Court raised the question whether there was evidence to support the finding of the Commissioner of Income-tax that the assessee firm was a resident firm in the Maru year 1990-91. The High Court in the course of its judgment referred to the evidence on which the Commissioner of Income-tax based his finding that the assessee was a resident firm.

[3] Inasmuch as no finding as to the residence of the assessee firm in the Maru year 1991-92 was recorded by the Income-tax Officer or the Appellate Assistant Commissioner, the Appellate Tribunal following the judgment of the High Court dated 21st September 1942, remanded the case to the Income-tax Officer by its order dated 18th November 1942, to record a finding on the question whether the assessee was a resident firm.

[4] The remittance made by the assessee firm in the year of account from Indore to Bombay amounted to Rs. 2,94,030. The Tribunal held that in the year of account the assessee firm made a profit of Rs. 1,01,085. The amount of Rs. 1,01,085 was taxed under S. 4 (2), Income-tax Act, before its amendment in 1939. According to the assessee's profit and loss account at Indore the total profit amounted to Rs. 92,357. Out of the amount of Rs. 92,357, a sum of Rs. 90,183 was even according to the assessee liable to be taxed and was taxed. Thus according to the assessee, the profit available at Indore for remittance in the year of account amounted to Rs. 2174. The Tribunal, however, held that the total profit available for remittance was Rs. 2174 plus Rs. 98,911. The sum of Rs. 98,911 was the amount spent by the partners of the firm in Bombay. The profit and loss account of the assessee showed a profit of Rs. 92,357 after making allowance for the amount of Rs. 98,911 spent by the partners in Bombay. In other words, the Tribunal held that the profit made by the assessee firm at Indore in the year of account amounted to Rs. 92,357 plus Rs. 98,911 = Rs. 1,91,268. Inasmuch as a sum of Rs. 90,183 out of Rs. 92,357 was already taxed on the basis of its having accrued in British India, the amount that could be taxed under S. 4 (2) of the Act came to Rs. 2174 plus Rs. 98,911 = Rs. 1,01,085. The Tribunal directed that this amount of Rs. 1,01,085 be taxed under S. 4 (2), Income-tax Act, before its amendment in 1939.

[5] The assessee firm made a profit at Indore in the Maru year 1988-89 and suffered losses in Maru years 1989-90 and 1990-91. It also made a profit as stated previously in the Maru year 1991-92 the year under reference. If the result of all these four years were to be taken into account, there would be a large debit balance in the profit and loss account.

[6] It was contended on behalf of the assessee firm that what was remitted to British India in the account year 1991-92 Maru year was capital and not profit. Included in the assessment was a brokerage of Rs. 1,25,032. It was contended before the income-tax authorities that no part of it could be subjected to tax.

[7] It was argued that the assessee maintained its accounts on mercantile basis. If that were so, in the year of account the amount payable to sub-brokers would have been shown in 1991-92 account books. This was, however, not done. There was, however, nothing to warrant the assessee's contention that it maintained accounts on mercantile basis in respect of the sub-brokerage payable by it.

[8] The questions of law that arose out of the facts stated above were :

(1) Whether the Central Board of Revenue had the power to assign the assessee's case to the Commissioner of Income-tax (Central) ?

(2) Whether the Commissioner of Income-tax (Central) had power to allot to the Income-tax Officer (Central), Section VI, the assessee's case ?

(3) Whether the Commissioner of Income-tax (Central) had the power to allot to the Income-tax Officer (Central) Section VII the assessee's case having already allotted it to the Income-tax Officer (Central) Section VI ?

(4) Assuming that the Central Board of Revenue had no power referred to in question (1) or assuming that the Commissioner of Income-tax (Central) had no power referred to in questions (2) and (3) above, is the assessment made on the assessee by the Income-tax Officer (Central), Section VII, rendered invalid ?

(5) Did the Income-tax Act require the Income-tax Officer (Central), Section VII, to issue a fresh notice under S. 22 (2), Income-tax Act, to the assessee ?

(6) If the answer to the preceding question is in the affirmative, is the assessment made on the assessee rendered invalid thereby ?

(7) Is the assessee firm precluded from raising the plea in regard to its residence in view of the decision of the High Court, as new facts were urged for the purpose of residence in the year of account ?

(8) Was there material before the Tribunal to come to a finding that the assessee firm was 'resident' in British India in the year of account, Maru year 1991-92 ?

(9) Did S. 4 (2), Income-tax Act, before its amendment in 1939, empower the Income-tax authorities to take into consideration the income, profits and gains including losses, of any year preceding the "previous year" relevant to the assessment year ?

[9] **Chagla C. J.** — The assessee is an unregistered firm consisting of two partners and had carried on business as managing agents of Hukumchand Mills of Indore and also business in cloth and money-lending at Indore as well as at Calcutta and Bombay. In this reference we are concerned with the assessment year 1936-37, the year of accounting being Maru year 1991-92, ending on 27th October 1935. The first six questions submitted to us are questions concerned with procedural matters, and a few facts may be stated in order to understand what we are

called upon to decide. On 27th August 1936, the assessee made their return, pursuant to a notice served on them under S. 22 (2), to the Income-tax Officer, Special Circle, Bombay. On 1st April 1939, that assessment was pending and on that day the Income-tax Amendment Act came into force. Pursuant to S. 5 (2) of the amended Act Mr. Sheehy, a Member of the Central Board of Revenue, passed an order on 18th April 1939, assigning various cases to the Commissioner of Income-tax, Central, and amongst the cases assigned was the case of the assessee. On 27th April 1939, the Commissioner of Income-tax, Central, purporting to act under S. 5 (5), allocated the assessee's case to the Income-tax Officer, Central, S. VI, and on 14th October 1939, the Commissioner of Income-tax, Central, purporting to act under S. 5 (5), allocated the case to the Income-tax Officer, S. VII. The order which is challenged as being without jurisdiction is the order of 14th October 1939. The material portion of S. 5 (5) which deals with this question is:

"(5) Inspecting Assistant Commissioners of Income-tax and Income-tax Officers shall perform their functions in respect of such persons or classes of persons... in accordance with any order which the Commissioner of Income-tax may make for the distribution and allocation of work to be performed."

Now it is not disputed that the Commissioner of Income-tax, Central, was within his rights when he made the order dated 27th April 1939, allocating the case to the Income-tax Officer, S. VI, but what is contended by Mr. Kolah is that having once allocated the case to that Officer the Commissioner of Income-tax, Central, could not make the order of 14th October 1939, as he has purported to do so. I see no reason why we should read S. 5 (5) as giving the power to the Commissioner of Income-tax to allocate or distribute the work with regard to the assessee only once. There is no warrant for the contention that once the Commissioner of Income-tax has allocated or distributed the work the power is exhausted and that he could not again allocate or distribute the work. Therefore, in my opinion, the order made by the Commissioner of Income-tax on 14th October 1939, allocating the assessment of the assessee to the Income-tax Officer, S. VII, was a competent order made by him under S. 5 (5).

[10] The second contention put forward by the assessee is that assuming that the allocation to the Income-tax Officer, S. VII, was a proper allocation, a fresh notice of assessment should have been issued to the assessee under S. 22 (2) of the Act. For this purpose he relies on sub-s. (7-A) of S. 5 of the Act which was incorporated into the Act by the Amending Act XI [11] of 1940. This sub-section deals with the power of the Commissioner of Income-tax to transfer cases

from one Income-tax Officer to another and also with the power of the Central Board of Revenue to transfer the cases from one Income-tax Officer to another. Such transfers may be made at any stage of the proceedings and the sub-section provides that when such a transfer is made it would not be necessary to re-issue any notice already issued by any Income-tax Officer from whom the case is transferred. Now when we look to this amending Act, this particular provision, viz., the incorporation of the new sub-s. (7A), has not been rendered retrospective and, therefore, as far as the provision contained in this sub-section is concerned, it came into operation after the passing of the Amending Act. To this extent Mr. Kolah is right. But what Mr. Kolah asks us to hold is that because sub-s. (7A) declares that the re-issue of the notice would not be necessary it follows that the re-issue of such notice was necessary before this amending Act was passed. In my opinion such a contention is opposed to all ordinary canons of construction. Merely because the Legislature for any reason chose to declare that a certain procedure is unnecessary, it does not follow as a necessary implication that such a procedure was necessary before such a declaration was made by the Legislature. What Mr. Kolah has got to satisfy us is that in fact under the law as it existed before this amending Act was passed the re-issue of the notice was incumbent and necessary. If the law required such a notice, then Mr. Kolah is right that inasmuch as sub-s. (7A) was not retrospective the absence of such notice would render the assessment of the assessee bad.

[11] Now in order to satisfy us that the re-issue of such a notice was necessary under the law as it existed, Mr. Kolah relies on S. 64 and he says that the law gave the assessee a right to be assessed by a particular officer and that right could not be taken away, and if the assessee is deprived of that right by their assessment being transferred to another officer, they should be given a fresh notice of assessment. There is no basis whatsoever for this contention, because the right to be assessed by a particular officer was in terms taken away by the Legislature when they enacted what was known as Ordinance IX of 1939 and which is now incorporated in the Income-tax Act as S. 64 (5). That sub-section says that sub-ss. (1) and (2) of S. 64 which deal with the Income-tax Officers who have to assess the returns of different assessee shall not apply and shall be deemed never at any time to have applied to any assessee where by any direction given or any distribution or allocation made by the Commissioner of Income-tax under sub-s. (5) of S. 5 a particular Income-tax Officer has been charged with the function

of assessing that assessee. Now, in this case, the Income-tax Officer who was appointed on 14th October 1939, was charged by the Commissioner under S. 5 (5) with the function of assessing the assessee before us and, therefore, the provisions of sub-ss. (1) and (2) of S. 64 do not apply to the case. In other words, their right to be assessed by any particular officer was taken away. If there was no such right, it could not be argued that they had a right of having a fresh assessment notice issued to them, when the case was transferred from the original Income-tax Officer to the Income-tax Officer appointed on 14th October 1939, under S. 5 (5).

[12] Coming next to the questions which are questions of substance, the first question is whether there was any evidence before the tribunal which justified it in coming to the conclusion that the assessee was a resident firm. Now this very question was considered by the High Court, *In re Sarupchand Hukumchand*, 47 Bom. L. R. 159: (A. I. R. (32) 1945 Bom. 258), with regard to the assessment of the assessee of the previous year, viz. 1935-36, and the High Court attached considerable importance to the registration certificate issued by the Registrar of Partnerships in which it was stated that the principal place of business of the assessee was Bombay. The High Court took the view that that was a material piece of evidence on which the Commissioner was entitled to rely. Apart from this certificate there were also other materials before the Commissioner and the High Court took the view that the Commissioner was right in the conclusion to which he came that the assessee was a resident firm in the material year of account. Now when it came to the assessment year 1936-37, the Income-tax department rightly refused to preclude the assessee from going into the question again merely because the High Court had held a particular view with regard to the assessment year 1935-36. It may be that although the firm was a resident firm in the year 1935-36, it still might be a non-resident firm in the assessment year 1936-37. Therefore the Income-tax department again considered all the materials placed before it and once again the department attached greatest importance, and rightly, to the registration certificate issued by the Registrar of Partnerships. So far as that position was concerned, it continued to be the same as it was when the High Court considered this very question. Apart from the certificate the department had also other materials before it and all those materials are mentioned and set out in the statement of the case submitted to us. Under the circumstances it is impossible to say that there was no material before the Tribunal which justified it in coming to the

conclusion that the assessee was a resident firm in British India in the year 1936-37.

[13] The next question deals with certain remittances received by the assessee in the year of account. The assessee made a profit at Indore in the Maru year 1988-89 and suffered losses in the years 1989-90 and 1990-91. It also appears that in the year 1991-92, with which we are concerned, they made a profit, but it would appear that taking into consideration all the four years, 1988-89, 1989-90, 1990-91 and 1991-1992 that on the whole and as a result of mere arithmetic there would be a loss rather than profit. The Tribunal was unable to determine at what different dates the remittances were made in the year of account and their inability was largely due to the fact that the assessee refused to produce their Indore books of account. The Tribunal held that the nett available profits which were remitted to British India were Rs. 1,91,268. Now Mr. Kolah does not find fault with this finding of fact; he does not dispute that there were profits in the year of account; he does not dispute that there were remittances in the year of account which should be attributed to these profits, but what he contends is that the Tribunal should not have isolated, as it were, the particular year of account, viz., 1991-92, but it should have looked at the picture as a whole and should have taken into consideration the fact that during the four years there was a nett loss and not a nett profit. Therefore Mr. Kolah argues that if the Tribunal had taken that view, then there were no profits which could be remitted to British India, and whatever remittances there were in the year of account were remittances out of capital and not out of profits. Now I can well understand the position where an individual or a firm carries forward losses from year to year and in any particular year the profits of that year may be set off against the losses which have been carried forward to that year. However, it may be that an individual or a firm may adjust at the end of each year its profit and loss and transfer it to the accounts of the partners and the profit and loss of the next year may be determined irrespective of what the position was at the end of the last year. Now there was absolutely no evidence before the Tribunal to show that the losses incurred in the years 1989-90, 1990-91 were carried forward. As I have already stated, the Indore books of account of the firm were not produced and there was nothing before the Tribunal from which it could have drawn a conclusion that the profits of 1991-92 were set off against the losses of the previous years. Therefore as the position stood and as the accounts appeared there were profits in the year 1991-92 out of which remit-

tances could have been made into British India, and the Tribunal has found it as a fact that such remittances were made out of available profits. The question really, therefore, resolves itself merely into a question of fact rather than a question of law. The question of law which the Tribunal has asked us to answer is whether under S. 4 (2) of the old Act the Income-tax authorities are empowered to take into consideration the income, profits and gains, including losses, of any year preceding the "previous year" relevant to the assessment year. Now under the old S. 4 (2) what was taxable was not income, profits and gains, but the remittances, and for the purposes of remittances the relevant year was "previous year." But I see no reason why for the purposes of income, profits and gains the relevant years should be the "previous years." Any income, profits or gains whether earned in the previous year or years prior thereto would become taxable provided they were remitted in the "previous year", and therefore it cannot be stated that the Income-tax authorities are precluded by law from considering the true state of affairs by looking into the financial position of the assessee of the years prior to the previous year. But as I have stated before, the discussion of the question of law is rather academic because the decision arrived at by the Tribunal turns more on facts actually found rather than any interpretation of any particular section of the Act.

[14] Apart from the questions raised by the Tribunal the assessee has taken out a notice of motion and require us to ask the Tribunal to submit a fresh question and that question deals with an item of Rs. 25,575. The assessee maintains a brokerage account and to the credit of this account was a sum of Rs. 1,25,032 and this amount was transferred to the account of the following year. At one time the contention of the assessee was that the whole of this amount was not liable to tax as it was not a profit of the firm. That contention was given up and the contention now put forward is that to the extent of Rs. 25,575 the amount was paid to sub-brokers and was not liable to tax. Now no payment of this sum of Rs. 25,575 appears in the books of account of the assessee for the relevant year. Mr. Kolah contends that the books of account are maintained by the assessee on mercantile basis and therefore although there may be no entry with regard to the payment if liability has been incurred then the assessee would be entitled to exemption in respect of this amount. But unfortunately for Mr. Kolah's clients there is not even an entry in the books of account for the relevant year showing any liability on the part of the assessee to pay this sum to the sub-

brokers. One should have expected an *havala* entry crediting the various sub-brokers who were entitled to this amount and debiting the brokerage account. But no such entry appears. Therefore the Tribunal was quite right in rejecting the claim of the assessee with regard to the sum of Rs. 25,575. We fail to see what question of law can possibly arise out of this decision of the Tribunal. We, therefore, refuse to accede to the application of the assessee to call upon the Tribunal to raise an additional question with regard to the sum of Rs. 25,575.

[15] We would, therefore, answer the questions raised by the Tribunal as follows: Questions 1, 2 and 3, in the affirmative. Questions 4 and 6 do not arise. Questions 5 and 7 in the negative. Question 8 in the affirmative. Question 9: see judgment.

[16] The assessee will pay the costs of the reference. The notice of motion will be dismissed with costs.

D. H.

Answers accordingly.

A. I. R. (36) 1949 Bombay 182 [C. N. 54.]
BHAGWATI J.

C. P. Bannerjee — Plaintiff v. B. S. Irani — Defendant.

O. C. J. Suit No. 3049 of 1947, Decided on 3rd November 1948.

Letters Patent (Bom.), Cl. 12 (as amended by Bom. Act XLI [41] of 1948)—Suit for recovery of Rupees 1000 filed on original side of High Court — Subsequently Bom. Act XLI [41] of 1948 and Bom. Act XLIV [44] of 1948 enacted—No provision for transfer of cases pending in High Court to Small Cause Court—Jurisdiction of High Court in respect of such cases, held, continued.

Where an action has been rightly instituted in a Court which had jurisdiction to entertain it, it would require strong and distinct words to defeat such vested right which has accrued to the litigant: A.I.R. (30) 1943 F.C. 24, *Rel. on.* [Para 11]

The plaintiff filed a suit to recover a sum of Rupees 1000 on 12th September 1947 on the original side of the High Court. Subsequently the Bombay Legislature enacted Bom. Act XLI [41] of 1948 and Bombay Act XLIV [44] of 1948. No provision was, however, made by the Legislature for transfer of suits pending in High Court to Small Cause Court:

Held that the absence of such provision had the result of continuing the jurisdiction of the High Court in the matter of determination and trial of suits which had been rightly received by it. [Paras 11 and 12]

N. A. Palkhiwalla — for Plaintiff.

M. M. Desai — for Defendant.

B. J. Divan *amicus curiae*.

Order. — In this matter I had delivered a judgment on 6th October 1948, but, after I did so, my attention was drawn to the fact that the Bombay Legislature had simultaneously with the enactment of Bombay Act (XLIV [44] of 1948) also enacted Bombay Act (41 [XLI] of 1948) called the Bombay High Court Letters Patent Amend-

ment Act, 1948. This necessitated a further argument and in the result I quashed the judgment which I had dictated on 6th October 1948, and put down the matter for further argument. The matter has been thereafter fully argued before me by Mr. Palkhiwalla appearing for the plaintiff, Mr. M. M. Desai appearing for the defendant and by Mr. B. J. Divan whom I appointed to argue the matter before me *per amicus curiae*.

[2] The question that falls to be determined by me in this matter is whether this Court has jurisdiction to further try and determine the suit, having entertained it at a time when according to the law as it then stood it had jurisdiction to entertain the same.

[3] The plaintiff filed this suit against the defendant on 12th September 1947, to recover a sum of Rs. 1000 with interest thereon at 6 per cent. per annum from 20th December 1945, or 13th February 1946, as the case may be, until judgment, costs and interest on judgment at 4 per cent. per annum till payment. The suit was thus for the recovery of a sum over Rs. 1000 and below Rs. 2000. Under S. 21, Presidency Small Cause Courts Act as it then stood the plaintiff had the election to institute this suit in the High Court, the amount or the value of the subject-matter thereof exceeding Rs. 1000 even though under S. 18 of the Act the Small Cause Court would have jurisdiction to try this suit, the amount or value of the subject-matter not having exceeded Rs. 2000. The plaintiff filed this suit in the High Court in pursuance of this election which was given to him under S. 21 of the Act and the suit was thus rightly received by the High Court and the High Court would in the ordinary course have had jurisdiction to try and dispose of the same, subject of course to the provisions contained in S. 22, Presidency Small Causes Courts Act, as it then stood, which provided that in case of suits cognizable by the Small Cause Court to which S. 21 applied no costs would be allowed to the plaintiff if the plaintiff obtained a decree for any amount or value of less than Rs. 300 and that the defendant would be entitled to his costs as between attorney and client if the plaintiff did not obtain any decree therein.

[4] In about May 1948, the Bombay Legislature enacted several enactments which were contemplated to deprive the High Court of jurisdiction to try suits cognizable by the Small Cause Court as well as the Bombay City Civil Court which was then about to be established. The Legislature intended to deprive the High Court of this jurisdiction to receive, try and determine suits between Rs. 1000 and Rs. 2000 which could be instituted by the plaintiff at his election in the High Court acting under the provisions of

S. 21, Presidency Small Cause Courts Act. The Legislature also intended to deprive the High Court of the jurisdiction to receive, try and determine suits not exceeding Rs. 10,000 in value and arising in Greater Bombay which were intended by it to be cognizable by the Bombay City Civil Court which was about to be established. With this end in view the Bombay Legislature enacted Bombay Act XL [40] of 1948 called the Bombay City Civil Court Act, 1948, which established an additional Civil Court for the Greater Bombay, constituted the Bombay City Civil Court, invested it with jurisdiction to try and dispose of all suits of a civil nature not exceeding Rupees 10,000 in value and arising within Greater Bombay, except certain suits or proceedings therein mentioned, provided that the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Civil Court and further provided for transfer of suits pending in the High Court in which issues had not been settled or evidence recorded on or before the date of the coming into force of that Act to the city Court to be heard and disposed of by the city Court as if the same had been originally instituted in that Court. The Bombay Legislature also simultaneously enacted Bombay Act XLI [41] of 1948 called the Bombay High Court Letters Patent Amendment Act, 1948, by S. 3 whereof an amendment was made in cl. 12 of the Letters Patent of the High Court in the last sentence thereof, which as amended read as under :

"Except that the said High Court shall not have such original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, or the Bombay City Civil Court."

The suits which were cognizable by the Bombay City Civil Court were prescribed in the Bombay Act XL [40] of 1948. So far as suits falling within the jurisdiction of the Small Cause Court at Bombay were concerned, the Bombay Legislature enacted Bombay Act XLIV [44] of 1948 called the Presidency Small Cause Courts (Bombay Amendment) Act, 1948, and by S. 2 thereof the election which was given to the plaintiff to institute in the High Court suits whereof the amount or value of the subject-matter exceeded Rs. 1000 was deleted and with regard to certain suits of the nature prescribed in S. 21, Presidency Small Cause Courts Act, also the jurisdiction of the Bombay City Civil Court was substituted for that of the High Court and the election given to the plaintiff to file such suits in the High Court was substituted by the election given to him to file such suits in the Bombay City Civil Court. The result of this enactment thus was that the original jurisdiction which had been invested in the High Court under cl. 12 of the Letters Patent to receive, try and determine suits whereof the

amount or value of the subject-matter exceeded Rs. 1000, though at the election of the plaintiff, was taken away from the High Court.

[5] All these Acts, Bombay Act (XL [40] of 1948), Bombay Act XLI [41] of 1948 and Bombay Act (XLIV [44] of 1948) along with others came into operation some time in August 1948 and thus arose the question as to whether, even though this Court rightly received or entertained this suit which was for an amount exceeding Rs. 1000 at the date when the same was instituted, it had further jurisdiction to try and determine the same.

[6] Strictly speaking, I am only concerned with the provisions of Bombay Act XLI [41] of 1948 and it would only be necessary for me to look to the provisions of that Act and determine the question which has arisen before me. In so far, however, as the enactments which were from time to time and particularly at this time in May 1948 enacted by the Bombay Legislature were so enacted with a view to cheapen the costs to the litigant and to protect him from the burden of costs of litigation in the High Court, I have thought it necessary to have the matter argued in extenso, having regard to the provisions which were enacted by the Legislature in the various enactments enacted by it with this end in view. The first of such enactments which would fall to be considered by me is the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947, being Bombay Act LVII [57] of 1947, and the other enactments will be those which were enacted in May 1948, viz., Bombay Act XL [40] of 1948, Bombay Act XLI [41] of 1948 and Bombay Act XLIV [44] of 1948. I shall base my decision on a general survey of the provisions of these various pieces of legislation enacted by the Bombay Legislature in order to have a comprehensive survey of what may be styled as the intendment of the Legislature in enacting these various pieces of legislation, so that it may not be possible to argue elsewhere that whatever decision was arrived at was arrived at by me being oblivious to what was legitimately intended by the Legislature while putting these enactments on the Statute Book.

[7] What was really intended by the enactment of Bombay Act XLIV [44] of 1948 was to take away the jurisdiction of the High Court in respect of suits whereof the amount or value of the subject-matter exceeded Rs. 1000 and to invest the same in the Small Causes Court, thus depriving the plaintiff of the election which had been given to him under S. 21, Presidency Small Cause Courts Act, which election it was conceived was such as when exercised would put the defendant to the unnecessary burden of incurring heavy costs in defending the litigation in the

High Court. With that end in view S. 21, Presidency Small Cause Courts Act was amended as provided in Bombay Act XLIV [44] of 1948, and a suitable amendment was also made in S. 22, Presidency Small Cause Courts Act, providing for special award of costs when the plaintiff sued in the High Court or in the Bombay city Civil Court in every case cognizable by the Small Cause Court. While enacting this Act XLIV [44] of 1948 however, the Legislature either purposely or inadvertently omitted to enact in this particular Act provisions of the type which it had already enacted in Bombay Act LVII [57] of 1947 and Bombay Act XL [40] of 1948 to which I will refer immediately hereafter.

[8] Bombay Act LVII [57] of 1947 was an Act to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and of evictions. At the date when this Act was passed there were various suits between landlords and tenants pending in the High Court. The Legislature under S. 28 of the Act laid down the jurisdiction of Courts and enacted that notwithstanding anything contained in any law and notwithstanding that, by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction, in Greater Bombay, the Court of Small Causes, Bombay, shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of Part II applied and to decide any application made under the Act and to deal with any claim or question arising out of the Act or any of its provisions, and no other Court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question. Having thus enacted the jurisdiction for the Small Cause Court in Greater Bombay in behalf of such suits and proceedings, the Legislature proceeded by S. 50 of that Act to enact that all suits and proceedings other than execution proceedings and appeals between a landlord and a tenant relating to the recovery or fixing of rent or possession of any premises to which the provisions of Part II applied etc., and which were pending in any Court shall be transferred to and continued before the Courts which would have jurisdiction to try such suits or proceedings under that Act. This was a provision clearly contemplated and enacted by the Legislature with a view that all suits and proceedings which were pending in the High Court so far as Greater Bombay is concerned and which were rightly entertained thithertofore by the High Court shall be transferred to the Small Cause Court which under S. 28 of the Act

had been enacted as the proper venue for the trial of such suits. No doubt at this time cl. 12, Letters Patent had not been amended by the Bombay Legislature as it was done later and it may be urged that this enactment of the provision of S. 50 of the Act was made by the Legislature with a view to transfer the suits which were already rightly instituted and pending before the High Court to the Small Cause Court as that was considered by the Legislature in the interests of the defendants to be the proper venue where the defendants would in any event not be saddled with the heavy costs of litigation which would be bound to be incurred if the litigation proceeded to its natural conclusion in the High Court.

[9] When one, however, comes to the enactments which were simultaneously enacted by the Bombay Legislature in May 1948, one finds that when the Bombay Legislature came to enact Bombay Act XL [40] of 1948 establishing the Bombay City Civil Court, and had on the anvil also simultaneously with it the enactment of Bombay Act XLI [41] of 1948 which sought to amend cl. 12, Letters Patent in the appropriate manner, the Legislature enacted a similar provision for transfer of the suits which were pending in the High Court to the Bombay City Civil Court. After having laid down the jurisdiction of the Bombay City Civil Court in S. 3 of the Bombay Act, XL [40] of 1948, and having also laid down in S. 12 thereof that the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Court, the Legislature proceeded to enact S. 18 of the Act which in express terms provided for the transfer of suits and proceedings cognizable by the City Court and pending in the High Court in which issues had not been settled or evidence not recorded on or before the date of the coming into force of the Act to the City Civil Court. This was a provision which was enacted by the Legislature in spite of the fact that simultaneously with it there was on the anvil the Bombay Act XLI [41] of 1948, which was amending cl. 12, Letters Patent by providing that the High Court shall not have original jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay or the Bombay City Civil Court. The amendment in terms which I have set out above shows not only that at this particular moment of time the Legislature had in contemplation the Bombay City Civil Court Act i. e., Bombay Act XL [40] of 1948, but it had also got in contemplation the Presidency Small Cause Courts (Bombay Amendment) Act, 1948, which was Bombay Act XLIV [44] of 1948. The terms of the amendment of cl. 12, Letters Patent can only be justified if one has regard to this fact which is patent on the face of the record that all these three Acts, Bombay

Act XL [40] of 1948, Bombay Act, XLI [41] of 1948 and Bombay Act XLIV [44] of 1948, were simultaneously conceived and put on the Statute Book. Even though the amendment of cl. 12, Letters Patent, in terms deprived the High Court of the jurisdiction to receive, try and determine suits falling within the jurisdiction of the Small Cause Court at Bombay or the Bombay City Civil Court, when the Legislature came to enact the Bombay City Civil Court Act, 1948, it provided under S. 18 thereof for the transfer of suits and proceedings cognizable by the City Civil Court and pending in the High Court in which issues had not been settled or evidence had not been recorded on or before the date of the coming into force of that Act to the City Civil Court. When the Legislature, however, came to enact Bombay Act XLIV [44] of 1948 which had the effect of depriving the High Court of jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Bombay, it, as I have observed before, either purposely or inadvertently failed to make a similar provision providing for a transfer of suits falling within the jurisdiction of the Small Cause Court at Bombay and which were pending in the High Court to the Small Cause Court. One would have naturally expected that as there was enacted S. 50 in the Bombay Act LVII [57] of 1947 and as there was enacted S. 18 in Bombay Act XL [40] of 1948, the Bombay Legislature would have thought it necessary or expedient also to enact a similar provision in Bombay Act XLIV [44] of 1948 providing for such a transfer. But for reasons which it is not possible for me to divine the Legislature did not do so and that is the reason why this question has fallen to be determined by me.

[10] The legislative history and the background which I have already given is sufficient to indicate that if the Legislature really intended that suits which were cognizable by the Small Cause Court and which had been already filed in the High Court in the exercise of the election which had been given to the plaintiffs in that behalf by S. 21, Presidency Small Cause Courts Act, as it then stood, should be transferred from the High Court where they had been rightly instituted to the Small Cause Court which was then considered by the Legislature to be the proper venue for the trial of such suits, the Legislature would have enacted a provision in this behalf, and in the absence of any such provision I am *prima facie* driven to the conclusion that the Legislature either purposely or inadvertently, and for the conclusion which I have arrived at it makes not the slightest difference what it was that was responsible for his omission in Bombay Act XLIV [44] of 1948,

omitted to make such a provision in Bombay Act, XLIV [44] of 1948. It may be that the number of such suits which might have been filed by the plaintiffs in the exercise of the election given to them in this behalf by S. 21, Presidency Small Cause Courts Act, as it then stood was not considered to be such as to require the benevolent intervention of the Legislature by way of providing for such a transfer from the High Court to the Small Cause Court. It may as well be that such a provision was omitted to be made by the Legislature through sheer inadvertence possibly in the hurry with which the legislation was rushed through in the Legislature at this time, which hurry is manifest by the number of Acts which it was thought fit to see through this particular Session of the Legislature. Be that as it may, the fact remains that the Court has only got to construe the enactment as it stands, even though the intention of the Legislature was as benevolent as I have described above, and if the attention of the Legislature had been drawn to this particular omission, I dare say it would have supplied it without the slightest hesitation in that behalf. What I have got to do here is to construe the enactment as it stands and not to supply any lacuna or defect in the legislation even though the construction which I put upon this piece of legislation may in certain events be such as to negative the very benevolent intention of the Legislature with which it was actuated in putting these various enactments on the Statute Book. This omission is glaring in view of the fact that similar provisions were in fact made by the Legislature itself in Bombay Act, LVII [57] of 1947 and Bombay Act, XL [40] of 1948, and I cannot conceive any draftsman having these various pieces of legislation before him to have omitted to incorporate in Bombay Act XLIV [44] of 1948 a provision of this type unless it was with purpose, or, I should not very easily say so but I am constrained to say so, due to inadvertence on his behalf.

[11] This is sufficient to dispose of the question, but I would like to fortify my conclusion which I have thus arrived at on a comparison of the various pieces of legislation hereinbefore referred to, by reference to the general principles of the construction of statutes. The Bombay Act XLI [41] of 1948 which amended the Letters Patent was enacted in May 1948 and came into operation towards the middle of August 1948. Normally it would not have a retrospective operation. It has been laid down as a fundamental rule of the English law, which we have been following here, that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or

arises by necessary and distinct implication. (See Maxwell on the Interpretation of Statutes, Edn. 9, p. 221). There is no doubt that so far as the statutes are concerned, a distinction is broadly made between procedural statutes and statutes which affect the substantive rights of the parties. There is no vested right which a subject has in regard to procedure. But with regard to the jurisdiction of the Court in which he has a right to institute proceedings a subject can have a vested right. That this is so is amply borne out by authorities and I shall only content myself with quoting one of them, which is an authority of the Federal Court, a judgment of Varadachariar J. reported in *Venugopala v. Krishnaswami*, A.I.R. (30) 1943 F. C. 24: (I.L.R. (1943) Kar. F. C. 21) and the passage at p. 27, col. 1, thereof:

"It will be noticed that in that case the Judiciary Act was passed during the pendency of the action in the Court of first instance and their Lordships' decision recognised that, from the date of the initiation of the action, the suitor had a right of appeal to a superior tribunal according to the state of the law as it stood at the time of the commencement of the proceeding. This necessarily involves the recognition of an equally valuable right that the proceedings should in due course be tried and disposed of by the tribunal before which it had been commenced. This principle that a statute should not be so interpreted as to take away an action which has been well commenced has been affirmed in various cases in differing circumstances. In *Marsh v. Higgins*, (1850) 9 C. B. 551: (19 L. J. C. P. 297) it was observed by Wilde C. J. that it must have been well known to both branches of the legislature that strong and distinct words would be necessary to defeat a vested right to continue an action which has been well commenced. (Cf. *In re Joseph Suche & Co. Ltd.* (1876) 1 Ch. D. 48: (45 L. J. Ch. 12) and see also *Vedavalli Narasiah v. Mangamma*, 27 Mad. 538: (14 M. L. J. 340) and *Subbaraya Mudaliar v. Rakki*, 32 Mad. 140: (1 I. C. 73)."

These observations of the Federal Court are enough to show that where an action has been rightly instituted in a Court which had jurisdiction to entertain it, it would require strong and distinct words to defeat such vested right which has accrued to the litigant. Do I find in the enactment of Bombay Act XLI [41] of 1948 any words which would go to show that the right to continue an action which has been actually commenced has been taken away from the litigant who had at the date of the institution of the suit conferred upon him by S. 21, Presidency Small Cause Courts Act as it then stood an election to institute that suit in the High Court? I fail to find any such words. There is not only that there are no strong and distinct words in that behalf, but I do not find also in the provisions of Bombay Act XLI [41] of 1948 anything which would induce me to say that that was the result intended by the legislature by necessary intentment because that necessary intentment has got to be found by me from the words of the statute

itself which the legislature thought fit to put on the statute book. On the contrary, if any regard be had to legislative background and the history which I have before referred to, it tends to one conclusion and one conclusion only that in the case of what may be compendiously described as Rent Suits the legislature provided for the transfer of such suits from the High Court to the Small Cause Court, that in the case of suits or proceedings which are cognizable by the City Civil Court the legislature also provided for a transfer of such suits or proceedings except in certain excepted cases from the High Court to the City Civil Court, whereas in the case of the suits which were falling within the jurisdiction of the Small Cause Court at Bombay by the deletion of the provisions for election contained in S. 21, Presidency Small Cause Courts Act as it then stood, no such provision was made by the legislature for the transfer of those suits from the High Court to the Small Cause Court. I feel therefore fortified by these general principles which have been laid down by the authorities in the conclusion which I have arrived at that the omission in that behalf, which was either purposeful or due to inadvertence has the result of continuing the jurisdiction of this Court in the matter of the trial and determination of these suits which have been rightly received by this Court.

[12] There is a further argument which also I will advert to in this connection and it is that under Cl. 12, Letters Patent, the jurisdiction which has been given to this Court is to receive, try and determine suits of the particular description therein mentioned. The jurisdiction of the Court is to receive, try and determine those suits. The first condition is that the suit should be received or entertained or looking at it from the point of view of the plaintiff, the plaintiff should be entitled to institute the suit in the Court. Merely receiving or entertaining of the suit is not the jurisdiction of the Court. That is merely opening the doors of the Court to the litigant so that he can walk in and have his suit accepted or received or entertained by the Court which act, however, is only for the purpose of trying and determining the suit and for nothing else. The trial and determination of the suit, even though they are important aspects of the exercise of the jurisdiction of the Court, have, however, got to be exercised by the Court only after the Court receives or entertains the suit at the instance of the plaintiff. Without any such reception or entertainment of the suit there cannot be any trial or determination thereof. Once the suit is received or entertained by the Court, it is received or entertained for the purpose of trial and determination of the issues

which are involved in that suit. No doubt the procedure which is laid down in the Civil Procedure Code and elsewhere may determine in what manner or mode the cause shall after being received or entertained be tried and determined by the Court, but the jurisdiction is exercised in the first instance by the Court by receiving or entertaining the suit. Cases are not wanting in this Court where the Court has refused to entertain suits or said that it has no jurisdiction to do so. Instances are to be found where the cause of action howsoever described may not fall within the four corners of Clause 12, Letters Patent and the Court has refused to exercise that jurisdiction. They have also refused to give leave under various circumstances which have commended themselves to the Court. All this goes to show that the reception or institution of the suit or the entertainment of the suit is an essential condition of the exercise of the jurisdiction by the Court and I cannot conceive of any jurisdiction exercised by the Court in respect of any suit which can be taken as divorced from the reception or entertainment of the suit and can only be considered in regard to the trial and determination of the issues involved in the suit filed before it at the instance of the plaintiff. I am therefore of the opinion that the words "receive, try and determine" should not be read disjunctively as argued by Mr. B. J. Divan but should be read conjunctively. Once the suit is received or entertained, the Court has jurisdiction to try and determine the same in spite of whatever has happened subsequently. The enactment of Bombay Act XLI [41] of 1948 no doubt took away the jurisdiction of this Court to receive, try and determine suits which fell within the jurisdiction of the Small Cause Court. That, however, had not the effect of taking away the jurisdiction of this Court to try and determine the suits which had been already validly received or entertained by it prior to the enactment of that Act. A vested right had accrued to the plaintiff in that behalf to have the suit tried and determined by this Court. That was not taken away by express words or necessary intendment as I have stated before, and in the absence of any such conclusion to which I may be driven, the only conclusion which I can come to is that this Court, having once received or entertained the suit validly in accordance with the provisions of the law as it then stood, has continued to have jurisdiction to try and determine the suit, such jurisdiction not having been taken away by express words or by necessary intendment.

[13] In view of the conclusion which I have arrived at above, I think it is absolutely unnecessary for me to go into the question whether

the Small Cause Court is a Court which is subordinate to the High Court and whether I should on my own motion transfer the suit to the Small Cause Court which no doubt is competent to try or dispose of the same. I decline to go into that question and would say nothing more on that point.

[14] The result, therefore, will be that the issue as to whether this Court has jurisdiction to further try and determine this suit will be answered in the affirmative. The costs of both the parties of the trial of this issue before me will be costs in the cause.

D.H.

Order accordingly.

A. I. R. (36) 1949 Bombay 188 [C. N. 55.]

RAJADHYAKSHA AND JAHAGIRDAR JJ.

The Manager, The Spring Mills Ltd. — Applicant v. G. D. Ambekar and another — Opposite Party.

Civil Revn. Appln. No. 465 of 1946, Decided on 14th November 1947.

Civil P. C. (1908), S. 115 — Court—Meaning of — Authority under Payment of Wages Act, (1936) not Court within S. 115—Payment of Wages Act (1936), Ss. 17, 18 and 22.

The mere fact that a statute provides an appeal to a Court from a particular body does not necessarily make that body a Court. The authority under the Payment of Wages Act is not a Court within the meaning of S. 115 and the High Court has no revisional jurisdiction over the orders of that authority: *Case law discussed.* [Paras 19 and 20]

Annotation: ('44-Com.) C. P. C., S. 115 N. 6.

Editorial Note.—See also A. I. R. (33) 1946 All. 276 (277); A.I.R. (31) 1944 Nag. 288: ILR 1944 Nag. 531. For *contra* cases, see A.I.R. (33) 1946 Lah. 316 (318, 319): I.L.R. 1947 Lah. 1 (FB); A. I. R. (32) 1945 Nag. 94 (94, 95): I.L.R. 1944 Nag. 540.

Sri Jamshedji Kanga, R. J. Kolah, Craigie, Blunt and Caroe, and Narayanaswami—for Applicant.

Shantilal Shah and Bhaishankar Kanga and Girdharlal (for No. 1) and K. C. Daphtary Advocate-General and B. G. Thakor, Addl. Asst. Government Pleader (for No. 2)—for Opponents.

Rajadhyaksha J. — This civil revision application raises an important question of jurisdiction of this Court to revise under S. 115, Civil P. C., a decision of the "authority" under the Payment of Wages Act. The applicant is a manager of the Spring Mills, Ltd., and as such responsible for the payment of wages to the employees of his Mills. In the year 1945 the Mills used to work overtime, and certain of its employees did overtime for which they were paid by the applicant the amount of remuneration according to S. 47, Factories Act, which provides that where a worker in any factory works for more than 60 hours in a week or where a worker in a factory other than a seasonal factory works for more than 10 hours in a day,

he shall be entitled in respect of the overtime worked to pay at the rate of $1\frac{1}{2}$ times the ordinary rates of pay. By sub-s. (2) of that section it is further provided that where a worker in a factory other than a seasonal factory works for more hours in a week than are permitted under S. 34, he shall be entitled in respect of the overtime work, excluding any overtime in respect of which he is entitled to extra pay under sub-s. (1), to pay at the rate of $1\frac{1}{2}$ times his ordinary rate of pay. The present opponent No. 1, who is a Secretary of the Rashtriya Girni Kamgar Sangh, and a person authorised to act under sub-s. (2) of S. 15, Payment of Wages Act, made an application in the Court of the authority appointed under S. 15 of that Act for the city of Bombay (Application No. 15 of 1946), on behalf of about 28 employees in the Mills. In this application it was alleged that the present applicant illegally deducted dearness allowance in computing the overtime allowance to be paid to such employees for the periods mentioned, namely from 1st August 1945, to 30th November 1945. Notices were issued to the applicant calling upon him to appear at the hearing before the said authority on a day fixed in the notice. The matter came up for hearing before the authority and by its order dated 9th July 1945, the authority decided against the applicant and directed him to pay the amount of Rs. 219-9-4 to the said employees on the ground that in computing the remuneration for the overtime worked by the employees between August 1945 and November 1945 the applicant had not taken into consideration and given to such employees dearness allowance at the appropriate rate or at any rate whatever. It is against that order of the authority that the present application has been filed in revision.

[2] After the present application was filed, the authority appointed under the Payment of Wages Act was joined as opponent No. 2. In the prayer clause, a writ of *certiorari* was asked for against the second opponent calling upon it to send to this Court the records of the said case for the purpose of inquiring into the legality of the order passed by it. When the application came up for hearing, it was realised that an application for a writ of *certiorari* must, in view of the recent Privy Council decision, lie on the original side of this Court. Sir Jamshedji Kanga, therefore, submitted that the name of the second opponent against whom a writ of *certiorari* was asked for may be deleted and that the present applicant was willing to pay its costs. We, therefore, direct that the name of opponent No. 2 may be removed, and the application against it for a writ of *certiorari* stand dismissed with costs.

[3] The present application, therefore, proceeds only as against opponent No. 1 and this Court is called upon in exercise of its revisional jurisdiction under s. 115, Civil P. C., to revise the order passed by the authority under the Payment of Wages Act.

[4] Mr. Shantilal Shah on behalf of opponent No. 1 has raised a preliminary objection that no revision is competent because the decision of the authority making that order is not subject to the revisional jurisdiction of this Court.

[5] In considering this question, whether the authority appointed under the Payment of Wages Act is a Court subject to the revisional jurisdiction of the High Court, it is necessary to consider some of the important provisions of the Payment of Wages Act. It is enacted by s. 15 (1) of the Act that

"the Provincial Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or other officer with experience as a Judge of a civil Court or as a stipendiary Magistrate to be the authority to hear and decide for any specific area all claims arising out of deductions from the wages, or delay in payment of the wages of persons employed or paid in that area."

Sub-section (3) of s. 15 says that

"when any application has been made by any person that an illegal deduction has been made by the employer from his wages, the authority shall hear the applicant and the employer and after such further inquiry (if any) as may be necessary, may, without prejudice to any other penalty to which such employer or other person is liable under the Act, direct the refund to the employed person of the amount deducted together with the payment of such compensation as the authority may think fit."

Sub-section (4) of the same section lays down that

"if the authority hearing an application is satisfied that the application was malicious or vexatious, the authority may direct that a penalty, not exceeding fifty rupees be paid to the employer."

Sub-section (5) is to the effect that

"any amount directed to be paid under s. 15 may be recovered —

(a) if the authority is a Magistrate, by the authority as if it were a fine imposed by him as Magistrate,

(b) if the authority is not a Magistrate, by any Magistrate to whom the authority makes application in this behalf, as if it were a fine imposed by such Magistrate."

By s. 17 the employer has been given a right of appeal if the total sum directed to be paid by way of wages and compensation by him exceeds Rs. 300. The employee, however, has been given a right of appeal to the District Court if the total amount of wages claimed to have been withheld from him exceeds Rs. 50. Sub-section (2) of s. 17 says that "save as provided above, any direction made by the authority shall be final."

[6] Section 18 lays down that

"every authority shall have the powers of a civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the atten-

dance of witnesses and compelling the production of documents, and every such authority shall be deemed to be a civil Court for all purposes of s. 195 and of Chap. 35, Criminal P. C., 1898."

[7] Section 22 enacts that

"no Court shall entertain any suit for the recovery of wages or of any deduction from wages in so far as the sum so claimed forms the subject-matter of an application under s. 15 of the Act."

[8] The Provincial Government has been given power to make rules to regulate the procedure to be followed by the authority under s. 15 of the Act. The rules so framed prescribe forms of application to the authority and for authorisation to act on behalf of the employed person. They also lay down rules for presentation of documents, refusal to entertain applications and for appearance of parties. The record of the proceedings is to be maintained in Form F and R. 11 says that

"in exercising the powers of a civil Court conferred by s. 18, the authority shall be guided in respect of procedure by the relevant orders of Sch. 1, Civil P. C. 1908, with such alterations as the authority may find necessary, not affecting their substance, for adapting them to the matter before him."

The Forms appended to the Rules refer "to the Court of the authority appointed under the Payment of Wages Act (IV [4] of 1936)."

[9] If the matter were *res integra*, we should have been inclined, on the construction of the relevant sections themselves, to hold that the authority is not a Court of civil judicature within the meaning of s. 115, Civil P. C. The word "Court" is not defined in the Payment of Wages Act, and the only definition of a "Court," of general application, is to be found in s. 3, Evidence Act. That definition says that it includes all Judges and Magistrates or persons, except arbitrators, legally authorised to take evidence. But it has been held in *Queen-Empress v. Tulja*, 12 Bom. 36, that "that definition was framed only for the purpose of the Act itself and should not be extended beyond its legitimate scope." The mere fact that the Act and the rules enjoin upon the authority to follow, as nearly as possible, the procedure of a Court of civil jurisdiction does not, in our opinion, make that authority a Court. As pointed out in volume 8 of Halsbury's "Laws of England" at p. 526 :

"There are tribunals with many of the trappings of a Court which nevertheless, are not Courts in the sense of exercising judicial power. A tribunal is not necessarily a Court in the strict sense of exercising judicial power because it gives a final decision; hears witnesses on oath; two or more contending parties appear before it . . . it gives decisions which affect the rights of the subjects; there is an appeal to a Court;"

Section 115, Civil P. C., refers to a Court, and from the preamble of the Code it would appear that the Court there contemplated is a Court of civil judicature. Sir Jamshedji Kanga referred to the fact that court-fees were levied in the

applications made before the authority and that in the forms prescribed under the rules the expression, "In the Court of the authority" appears. In our opinion, these two tests are not necessarily conclusive. There are many authorities for the filing of applications before whom Court-fees are required to be paid under the Court-fees Act. The mere use of the word "Court" would not make that tribunal a Court of the civil judicature. For example, there are Courts of University, there are Labour Courts and there is an Industrial Court. They are undoubtedly Courts in so far as they exercise some kind of judicial function, but it has nowhere been held that merely because they are styled as Courts, they are Courts of civil judicature so as to attract the application of s. 115, Civil P. C. So far, the decisions of the Industrial Court have been sought to be challenged not by way of revision applications but only by writs of *certiorari* on the original side of this Court.

[10] It is also necessary to realise what the scope and purpose of the Act is. Before the enactment of the Payment of Wages Act, all suits now made cognisable by the authority had to be filed in ordinary civil Courts. Under s. 22, Payment of Wages Act, the ordinary jurisdiction of the civil Courts is ousted and special tribunals are created and, therefore, the section draws a clear distinction between an authority and ordinary civil Courts. The Payment of Wages Act does not create any new rights but merely creates special tribunals for special class of people. It applies, in the first instance, to the payment of wages to persons employed in any factory and to persons employed (otherwise than in a factory) upon any railway by a railway administration. [See s. 1 (4)]. Similarly under sub-s. (6) of s. 1 "nothing in the Act shall apply to wages payable in respect of a wage period, which over such wage-period, average two hundred rupees a month or more." For those who do not come within the scope of these provisions, the ordinary remedy of applying to the civil Courts remains. In this view the authority must be regarded as something different from ordinary Courts of civil judicature.

[11] In our opinion, the provisions of s. 18 and s. 22 make it clear that the authority cannot be regarded as a Court of civil judicature. Section 18 lays down that

"every authority appointed under sub-s. (1) of s. 15 shall have all the powers of a civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of document."

If the authority were a civil Court, it would hardly have been necessary to enact that for certain purposes only it should have the powers of a civil Court. The second provision in the

same section, viz., that "every such authority shall be deemed to be a civil Court for all the purposes of s. 195 and of chap. 35, Criminal P. C., 1898," again emphasises the same fact. For these purposes although it is not a civil Court in the ordinary sense of the term, it is to be deemed to be civil Court. Somewhat similar provisions came up for consideration before Chagla J. in *People's Own Provi. & Gen. Ins. Co. v. Guracharya*, 47 Bom. L. R. 852 : (A. I. R. (33) 1946 Bom. 200). The learned Judge had there to consider the powers of Debt Adjustment Board under the Bombay Agricultural Debtors' Relief Act. Section 7 of that Act provided that the Board shall have the same powers as are vested in civil Courts under the Code of Civil Procedure, and reliance was placed on this provision for asking the Court to hold that the Debt Adjustment Board was a Court within the meaning of the Civil Procedure Code so as to attract the revisional jurisdiction of this Court under s. 115, Civil P. C. The learned Judge observed as follows (p. 853) :

"The very fact that the Legislature had to vest the Board with powers which a civil Court possesses goes to show that the Board is not a Court. The fact that similar powers which a civil Court possesses are given to this Board by the statute does not constitute it a Court."

With respect we are in agreement with the view of the learned Judge. Similarly, s. 22 makes it clear that there is a distinction between the applications made before an Authority and suits ordinarily filed before a civil Court. In our opinion, therefore, it must be held that the Authority is not a Court of civil judicature within the meaning of s. 115, Civil P. C.

[12] Our attention has been invited to a decision of a Full Bench of the Lahore High Court in *Works Manager Carriage and Wagon Shops, Moghalpura v. Hashmat*, I.L.R. (1947) 28 Lah. 1 : (A.I.R. (33) 1946 Lah. 316 F.B.) where this very point came up for consideration, and it was held by the Full Bench that

"the Authority appointed under s. 15, Payment of Wages Act, must be regarded as a civil Court and as such a Court subordinate to the High Court within the purview of s. 115, Civil P. C."

The learned Judges who decided that application, apart from considering the question on its merits, were, to some extent, influenced by a Full Bench decision of the Patna High Court in *Mt. Dirji v. Srimati Goalin*, 20 Pat. 373 : (A.I.R. (28) 1941 Pat. 65 F.B.). It is, therefore, necessary to consider the implications arising out of the Full Bench decision of the Patna High Court. The case that the Patna High Court had to consider was a case arising under the Workmen's Compensation Act, 1923, and the learned Judges held that "the Commissioner appointed under the Workmen's Compensation Act was a Court." They held that the Commissioner under the Act

constituted an independent tribunal, that his function was to judge and decide and not merely to inquire and advise and that in judging or deciding the matters before him he had to proceed judicially and not arbitrarily. In short he satisfied all the main tests which one had to apply for determining whether a tribunal was a Court or not. According to the learned Judges "the question which has to be asked in such cases is whether the person so designated has been invested with the powers as a Court or otherwise. If he is invested with the powers as a Court, the necessary implication is that the jurisdiction of the Courts is enlarged and its decision is subject to all the incidents of such jurisdiction. If the powers are conferred on him not as a Court, he is a mere *persona designata* and his decision will not be subject to the incidents of such jurisdiction as the Court ordinarily exercises."

They further held that

"there was no antithesis between the expressions '*persona designata*' and 'Court' and that in other words even a *persona designata* may be a Court. Whether he is a Court or not depends upon his powers and the functions which he has to discharge."

This view of the Patna High Court is in direct conflict with the view of our own High Court in *Trustees of the Port of Bombay v. Bhima Raoji*, Civil Revn. Appln. No. 255 of 1926, D/- 11th January 1927, by Fawcett and Patkar JJ. That was a decision given so long ago as 11th January 1927, by Fawcett and Patkar JJ. In a short judgment they stated :

"We think it is clear that the Commissioner under the Workmen's Compensation Act, VIII [8] of 1923, is not a Court within the meaning of S. 115, Civil P. C. Sir Thomas Strangman for the applicant has frankly conceded that this is so, and has drawn our attention to the provisions which support that position. In particular those of sub-s. (2) of S. 19 and Ss. 23 and 27 seem to me practically conclusive on the point."

This decision of the Division Bench is binding on us. Similar view was taken by a Division Bench of the Chief Court of Sind in *Century Flour Mill, Shikarpur v. Amir Baksh*, A. I. R. (24) 1937 Sind 6: (30 S. L. R. 351). The learned Judges held that :

"Section 115, Civil P. C. related only to the records of cases decided by Courts subordinate to the High Court and that the Commissioner under the Workmen's Compensation Act was not a subordinate Court for the purposes of S. 115. The effect of the amendment of the Workmen's Compensation Act by Act V [5] of 1929 was not to make the Commissioner a subordinate Court for the purpose of S. 115. He was deemed to be a Court only for the limited purposes set out in S. 23, Workmen's Compensation Act."

These observations apply with equal force in considering whether the Authority under the Payment of Wages Act is to be deemed a Court or not.

[13] Moreover, it would not altogether be safe to apply the decisions with respect to the Workmen's Compensation Act to the construction of a statute like the Payment of Wages Act. It is true that the Lahore High Court in the Full

Bench case referred to above says that the comparison of the provisions of the Payment of Wages Act with the provisions of the Workmen's Compensation Act, 1923, makes it clear that the provisions of the two Acts are almost identical in character. With respect we think it necessary to point out that there are at least two points in which the provisions differ. The Workmen's Compensation Act created new rights and established special tribunals. Before the enactment of the Workmen's Compensation Act there were various defences open to the employer such as contributory negligence on the part of the employee, the doctrine of common employment and the principle of *volenti non fit injuria*. Under the Workmen's Compensation Act such defences were made invalid. The Payment of Wages Act, on the other hand, creates no new rights but establishes special tribunals for special classes of cases and it may be that the special rights given under the Workmen's Compensation Act may make it necessary to hold that there was revisional jurisdiction in the High Court over the orders of the Commissioner. Secondly, the Workmen's Compensation Act provides an appeal to the High Court in certain cases while there is no such appeal provided under the Payment of Wages Act. Thirdly, a Commissioner for Workmen's Compensation can submit a case to the High Court while there is no such provision under the Payment of Wages Act.

[14] Coming next to the Full Bench case of the Lahore High Court in *Works Manager, Carriage and Wagon Shops, Moghalpura v. Hashmat*, I. L. R. (1947) 28 Lah. 1: (A. I. R. (33) 1946 Lah. 316 F.B.) the first argument that weighed with their Lordships was that the Authority had all the attributes of a civil Court. Abdul Rashid Ag. C. J., observed as follows (p. 13) :

"One of the fundamental tests whether a certain Tribunal is a Court or is not so is whether it exercises jurisdiction by reason of the sanction of the law or whether jurisdiction is given to it by the voluntary submission of the parties to a dispute."

The test so adopted merely draws a distinction between such tribunal as an arbitrator to whom there is a voluntary submission of the parties and other tribunals created by law. If this test were adopted, all tribunals created by law must necessarily be regarded as Courts. In election matters whenever there is a dispute, the matter is under law decided by such a tribunal as a District Judge or a Judge of the Small Causes Court, and it has been held in numerous cases by our High Court that a District Judge or a Small Cause Court Judge deciding an election dispute is not a Court. It cannot, therefore, be said to be an invariable rule that every tribunal created by Legislature and exercising the Sove-

reign's power to decide a dispute between the subject is necessarily a Court within the meaning of S. 115, Civil P. C.

[15] Another test which was applied by the Full Bench was whether the tribunal takes cognisance of a *lis* and whether in exercising its functions it proceeds in a judicial manner. Most tribunals created by statutes have got to proceed in a judicial manner, observe the principles of natural justice and decide cases in accordance with law or justice, equity and good conscience. Merely because most tribunals proceed on these principles, it does not necessarily follow that they become Courts of civil judicature so as to come within the purview of S. 115, Civil P. C. We have already referred to a passage in Halsbury's "Laws of England" from which it would appear that there are many tribunals which have the trappings of a Court but are nevertheless not Courts in the sense of exercising judicial power. As we have stated above and as was held by Chagla J. in *People's Own Provident and General Insurance Co. v. Guracharya*, 47 Bom. L. R. 852 : (A. I. R. (33) 1946 Bom. 200) the fact that powers similar to the powers of a civil Court are given by a statute does not constitute that tribunal a Court.

[16] The third argument that weighed with the learned Judges constituting the Full Bench was that under S. 17 of the Act if the compensation awarded by the authority exceeds Rs. 300 the employer can prefer an appeal before the District Court, and if the total amount of wages deducted from the employee exceeds Rs. 50 he can also prefer an appeal to the District Court. The learned Judges thought that it was clear from these provisions that if the amounts are above Rs. 300 and Rs. 50 respectively, the Authority should be regarded as subordinate to the District Court and they considered it "anomalous if it were held that if the Court directs the employer to pay a sum of Rs. 300 to the employee, the authority is a Court, but that if the authority directs the payment of a sum of Rs. 299 it is not a Court and that neither the District Court nor the High Court has power to correct the grossest abuse of authority and procedure if the amount awarded is Rs. 299." With respect we do not think that this argument is sufficient to constitute the authority a Court. The authority does not become a Court subordinate to the District Court merely because an appeal is provided from its decisions to the District Court. When the High Court entertains an application against the decision of a District Court in appeal from a decision of the authority, the High Court exercises revisional jurisdiction over the District Court. There is no question of depriving the High Court of revisional jurisdiction to correct

the grossest abuse of authority by limiting the amount awarded to Rs. 299. A line has to be drawn at some point beyond which there can be an appeal to the District Court and below which no appeal lies.

[17] The last argument which was upheld by the Full Bench of the Patna High Court and which appealed to the learned Judges constituting the Full Bench of the Lahore High Court was that there was no antithesis between *persona designata* and Court. We ourselves should have been inclined to the view that the expression *persona designata* would suggest that the authority which is so designated is not a Court. But our view is strengthened by a decision of a Division Bench of this Court in *Sholapur Municipality v. Tuljaram Krishnasa* 55 Bom. 544 : (A.I.R. (18) 1931 Bom. 582). Patkar J. at p. 552 of the Report draws a distinction between a Court and a *persona designata*. The conclusion at which he arrives is:

"It appears, therefore, that where a Judge or the presiding officer of a Court as distinguished from the Court itself is directed to perform any function of an authority created by a statute such a Judge may be considered as a *persona designata* and not a Court, but where a civil Court subordinate to the High Court is constituted an authority to decide the rights between the parties and is directed to perform judicial functions, it is difficult to hold that such a Court is a *persona designata* and not a Court subordinate to the High Court."

If Patkar J. was prepared to hold that if a presiding officer of a Court was a *persona designata* and not a 'Court' if he was directed to perform any function of an authority created by a statute, it would follow that the reasoning would apply with even greater force when the authority which is directed to perform judicial functions is not the presiding officer of a Court at all but an independently created tribunal.

[18] Apart from the decision of the Full Bench of the Lahore High Court, the point came up for a direct decision in three cases of the Nagpur High Court. In *Turabali v. Sorabji* I. L. R. (1944) Nag. 531 : (A.I.R. (31) 1944 Nag. 288), Bose J. held that

"the authority appointed by the Provincial Government under S. 15 (1), Payment of Wages Act to settle claims under the Act was a *persona designata* and not a civil Court subordinate to the High Court within the meaning of S. 115, Civil P. C."

He held therefore that "the High Court had no jurisdiction to entertain a revision against a decision of such an authority." With respect we are in agreement with the view expressed by the learned Judge. A similar question arose before the same Court two months later and Bobde J. held in *Shrinivas v. Superintendent, Government Printing, Nagpur*, I. L. R. (1944) Nag. 540 : (A.I.R. (32) 1945 Nag. 94) that

"the word 'final' in S. 17 (2), Payment of Wages Act means that an appeal will not lie as provided by S. 17(1)

of the Act, and that it does not prohibit an application for revision under S. 115, Civil P. C."

The view of the learned Judge that the word "final" in S. 17 (2) merely precludes an appeal has the support of many decisions of both this High Court and other High Courts. But the question whether the authority was a Court at all does not appear to have been argued before the learned Judge and in any case, the direct authority of the earlier decision of Bose J. does not appear to have been brought to the notice of the learned Judge. In *Debidutt v. C. I. Electrical Supply Co.*, A. I. R. (32) 1945 Nag. 244 : (I. L. R. (1945) Nag. 587), Sen J. noticed the conflict between the two earlier decisions of the same Court referred to above and stated that if it had been necessary for him to reconsider those cases, he would have referred the matter to the Honourable the Chief Justice for constituting a division bench to resolve the conflict; but the matter before him, however, came on a revision application against the appellate authority, which in that case was the District Judge, and there was no dispute nor can there be any, that the High Court has revisional jurisdiction against the order of the District Court functioning as a Court and not as a *persona designata*.

[19] Sir Jamshedji Kanga referred us to three decisions of this Court in which this Court entertained applications in revision under the Payment of Wages Act. But if those cases are examined, it would appear that the applications in revision were in respect of the orders passed by the District Court or the Small Causes Court. In *Dixit v. Senior Inspector of Factories*, 41 Bom. L. R. 1283 : (A. I. R. (27) 1940 Bom. 87), the delayed wages were awarded by the Magistrate functioning as the authority, and this order was confirmed by the District Judge. It was against the order of the District Judge that an application was entertained in revision by this Court. No question of the jurisdiction of this Court to entertain revision applications against the order of the authority was raised, as the order sought to be revised was the District Judge's order. In *Arvind Mills, Ltd. v. Gadgil*, 42 Bom. L. R. 955 : (A. I. R. (28) 1941 Bom. 26), again the application entertained by this Court was against the order of the Assistant Judge functioning as an appellate Court over the decisions of the authority under the Payment of Wages Act, which in that case was the City Magistrate of Ahmedabad. Obviously, a revision application lay over the decision of the Assistant Judge and no question arose about the entertainment of a revision application against the decision of the authority itself. And, lastly, in *Chimanlal v. Junior Inspector of Factories*, A. I. R. (29) 1942 Bom. 273 : (I. L. R. (1942) Bom. 649), applications were

filed against the decision of the Assistant Judge who had decided appeals against the authority under the Payment of Wages Act, which in that case was the Court of the Additional District Magistrate, Ahmedabad. Divatia J. held that no appeals lay against the decisions of the Assistant Judge and allowed the actual appeals that were filed to be converted into revision applications, although in deciding those revision applications he did go into the question whether the Magistrate functioning as an authority had jurisdiction to entertain those applications for the payment of compensation alone. In any case, the question whether the High Court could entertain any direct revision application against the decision of the authority under the Payment of Wages Act was never argued and in form at least he was considering revision applications against the orders of the Assistant Judge. No authority has been cited to us which holds that the High Court can entertain revision applications direct from the decisions of the authority under the Payment of Wages Act. As was pointed out by Chagla J. in *People's Own Provident and General Insurance Company v. Guracharya* 47 Bom. L. R. 852 : (A. I. R. (20) 1933 Bom. 200), the fact that the Act permits appeals to the District Court would give revisional powers to the High Court when the District Court decides the appeal; but the mere fact that a statute provides an appeal to a Court from a particular body does not necessarily make that body a Court. With respect we are in agreement with this view, although that view was expressed with reference to a similar provision under the Bombay Agricultural Debtors' Relief Act.

[20] For all these reasons we are of opinion that the authority under the Payment of Wages Act is not a Court within the meaning of S. 115, Civil P. C., and that therefore this Court has no revisional jurisdiction over the orders of that authority. The application is, therefore, dismissed and the rule discharged with costs.

D.H.

Rule discharged.

A. I. R. (36) 1949 Bombay 193 [C. N. 56.]

DIXIT AND JAHAGIRDAR JJ.

Sankalchand Kuberda — Defendant — Appellant v. Joitaram Ranchhod — Plaintiff — Respondent.

First Appeal No. 339 of 1943, Decided on 12th December 1947, from order of Joint Civil Judge (Senior Division), Ahmedabad, in Special Suit No. 89 of 1942.

Contract Act (1872), S. 55—Time whether essence of contract—Defendant agreeing to sell property to plaintiff—Plaintiff to pay consideration within three years with interest—Plaintiff in possession executing rent note in favour of defendant on same day—Held defendant's amount was carrying interest in form of rent—Hence time not of essence of con-

tract—Agreement enforceable even after period of three years—Defendant not entitled to both interest and rent.

The plaintiff sold the suit property but continued to remain in possession. The defendant purchased the property from the plaintiff's vendee. Subsequently, the defendant entered into an agreement with the plaintiff under which the defendant agreed to sale the property to the plaintiff for Rs. 2000 to be paid at any time within 3 years with interest at Re. 0-14-6 per cent. per month. On the same day, the plaintiff executed a rent note in defendant's favour agreeing to pay Rs. 17-8-0 per month as rent.

In a suit for specific performance of the agreement to sell:

Held, that the agreement and the rent note formed part of the same transaction and reading them together the intention of the parties was that the defendant's capital of Rs. 2000 was to earn interest in the form of rent and the plaintiff was to remain in possession. As the defendant's amount was carrying interest, time could not have been of the essence of the contract and the agreement could be specifically enforced even after the period of three years: A. I. R. (2) 1915 P. C. 83 and A. I. R. (14) 1927 Bom. 111, *Rel. on.* [Para 9]

The defendant was not, however, entitled to both interest and rent. The real intention was that the defendant was to be paid interest in the form of rent. Hence the defendant must be put to his election either to receive the interest or the amount of rent.

[Para 10]

Annotation: (146-Man.) Contract Act, S. 55 N. 3.

J. C. Shah and N. C. Shah — for Appellant.

R. J. Thakor and R. M. Shah — for Respondent.

Jahagirdar J.—The facts of the case are as follows: The plaintiff was the owner of the suit properties. He had sold them to different persons but had continued to remain in possession. The defendant purchased the properties in the name of his minor son for Rs. 1500 from the plaintiff's vendees. On 29th October 1934, there was an agreement, Ex. 42, between the defendant and the plaintiff, under which the defendant agreed to sell the property for Rs. 2000 to be paid at any time within three years with interest at Re. 0-14-6 per cent. per month. If the money was not paid, the defendant was at liberty to deal with the property in any manner he liked. On the same day, the plaintiff executed a rent note in defendant's favour in respect of the properties purchased by him, agreeing to pay Rs. 17-8-0 per month. On 20th July 1937, the defendant sent a notice to the plaintiff calling upon him to pay the arrears of rent and give vacant possession within 15 days. On 14th August 1937, the plaintiff replied by Ex. 36, alleging that he had sold to the defendant by conditional sale for Rs. 2000 and that the defendant was to sell the properties to him if he paid Rs. 2000 with interest at the rate of Rs. 17-8-0 per month, which amount the defendant was pleased to call as rent, and that he was arranging to return the amount due to him. The defendant sent another notice by Ex. 37 on 31st December 1937, calling upon him to surrender

possession immediately and intimating to him that a suit would be filed against him if he failed to vacate. In this notice defendant did not say anything about the allegations made by the plaintiff in Ex. 36. The defendant then filed Regular Suit No. 132 of 1939 against the plaintiff to recover possession of the properties on the strength of the rent note and obtained a decree, and in execution of the decree he got possession in June 1940. On 26th October 1940, the present suit was filed by the plaintiff in *forma pauperis* for specific performance of the agreement to sell executed on 29th October 1934.

[2] The defendant denies the plaintiff's claim and contends that his minor son Chandrakant in whose name the sale deeds stand was a necessary party, that the suit is time-barred, that the time was of the essence of the contract, and as the money was not paid within three months (*years?*), the plaintiff is not entitled to specific performance and that the agreement to sell, not being registered, was inadmissible in evidence. The trial Court held that Chandrakant was not a necessary party, that the agreement was not required to be registered, and that the suit is neither barred by time or laches and that the plaintiff did not commit the breach of his promise to pay and that it is proved that negotiations with Ghanchi were broken because of defendant's action. The Court, therefore, decreed the specific performance of the agreement, subject to certain conditions with which we will deal later. Against this decree the defendant comes in appeal.

[3] In appeal he concedes that the agreement does not require to be registered and is admissible in evidence and that the suit is within time. His principal contention is that the finding of the lower Court that the plaintiff did not commit the breach of his promise to pay is wrong and that the time was of the essence of the contract and as the payment was not made within three years, he was at liberty to do anything he liked with the property and that the plaintiff is not, therefore, entitled to specific performance even in equity.

[4] We are not convinced that the learned Judge is right in holding that the plaintiff did not commit breach of his promise to pay. It is the plaintiff's case that the defendant had been responsible for the plaintiff's failure to pay in time. According to him he had persuaded one Ghanchi to advance to him Rs. 3000. It was arranged that the Ghanchi should pay Rs. 3000 to plaintiff and the plaintiff was to pay the same to defendant and get a sale deed in his favour and the plaintiff then was to pass a mortgage deed in favour of the Ghanchi in respect of those properties. This part of the plain-

tiff's story is corroborated by entries in the stamp-vendor's book which shows that on 14th April 1936, stamps of the value of Rs. 49 were purchased in the name of the defendant and stamps worth Rs. 78-8-0 were purchased in the name of the plaintiff. This amount of rupees 127-8-0 for the purchase of stamps was advanced to the plaintiff by the Ghanchi and the plaintiff had executed a pro-note for that amount in the Ghanchi's favour. The stamp-vendor's book contains the thumb impression of the defendant against the entry of Rs. 49. It is, therefore, clear that the defendant was a party to this arrangement. But the versions of the plaintiff and the defendant differ with regard to what happened subsequently. According to the plaintiff, the negotiations fell through because the defendant refused to show his title deeds to the Ghanchi. The defendant, on the other hand, says he showed the title deeds to the Ghanchi but he declined to advance Rs. 3000 to plaintiff as the sale deeds had been taken in the name of his minor son Chandrakant. We are inclined to hold that the defendant's version is true. The Ghanchi had filed a small cause suit to recover Rs. 127-8-0 from the plaintiff on the promissory note. The present plaintiff then contended in his written statement that he was not liable to pay as the Ghanchi committed a breach of agreement by refusing to advance Rs. 3000. When the plaintiff was asked in his cross-examination about this written statement in the suit on the pro-note, he admitted that what he stated in the written statement was true. In this written statement, the present plaintiff has not stated anything about the defendant's refusal to show the title deeds. The plaintiff has, therefore, not established that the defendant was responsible for the failure of negotiations with the Ghanchi. But this incident only serves the purpose of showing that the plaintiff was attempting to pay the amount to the defendant but he did not succeed as the title deeds were in the name of a minor and the Ghanchi was not willing to risk his money.

[5] The next point is whether the time was of the essence of the contract. The answer to it is decisive of the appeal. The law on the point is contained in S. 55, Contract Act, which provides that :

"When a party to a contract promises to do a certain thing at or before a specified time and fails to do any such thing at or before the specified time, the contract becomes voidable at the option of promisee, if the intention of the parties was that time should be of the essence of the contract."

In the leading case of *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, 43 I. A. 26 : (A. I. R. (2) 1915 P. C. 83), their Lordships observe (p. 31) that they

"do not think that this section lays down any principle which differs from those which obtain under the law of England as regards contracts to sell land. Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time."

[5a] Bearing these principles in mind, we have to construe the agreement Ex. 42. It is executed by the defendant in plaintiff's favour. It runs as follows :

"this is to execute this karar to you that the properties as mentioned below have been purchased by me for an amount of Rs. 2,000, and I have got this document registered. But the said properties were originally of your ownership and hence in case you pay me Rs. 2,000, as the sale price and the amount of interest calculated at the rate of Re. 0-14-6 per cent. per month within a period of three years from today, then I shall transfer the above mentioned property at your cost and risk. But in case you do not pay the said amount within the period of three years mentioned above, then on the expiry of the period we shall deal with the property in the manner I like and the said property shall be mine and you shall have no right therein. But if you pay the amount as mentioned above in the said period, then I shall transfer the said property to your name."

[6] On this very day simultaneously with this document, plaintiff executed a rent note Ex. 39 in favour of the defendant. It reads as follows :

"You have purchased the properties mentioned below. I have taken on rent the same from you for a period of 11 months and 29 days with rent accruing due from 22nd October 1934. That rent for the same is fixed at the rate of Rs. 17-8-0 per month and I shall pay the said rent to you every month as it accrues due and on expiry of the period, I shall hand over possession of the same with the rent which may have accrued due by vacating the said property."

[7] In our view, these two documents form part of the same transaction and they have to be read together, and we have to gather the intention of the parties whether they regarded the time as of the essence of the contract.

[8] At the time when the defendant purchased the properties, the plaintiff was in possession. He was the original owner of the properties. He was unwilling to surrender possession of this property to the defendant. The defendant, therefore, agreed that he was prepared to sell the property to the plaintiff if he paid Rs. 2,000 with interest at Re. 0-14-6 per cent. per month within three years. The interest at Re. 0-14-6 on Rs. 2,000 roughly comes to about Rs. 17-8-0 per month. The plaintiff, therefore, executed a rent note agreeing to pay Rs. 17-8-0 per month. The intention, therefore, appears to be this that the defendant's capital of Rs. 2,000 was to earn interest in the form of rent and the plaintiff was to remain in possession. As the defendant's amount was earning interest, time could not have been of the essence of the contract.

[9] But it is urged by Mr. J. C. Shah, the learned counsel for the appellant, that in this agreement there is an express condition that if the plaintiff failed to pay Rs. 2,000 with interest within three years, the defendant would be at liberty to sell it to any one he liked and that the plaintiff would have no right in the property and that this case is not therefore affected by the ruling in *Jamshed Khodaram Irani v. Burjorji Dhunjibhai*, 43 I. A. 26: (A. I. R. (2) 1915 P. C. 83). In the Privy Council case, the respondent had agreed to sell to the appellant certain leasehold land for Rs. 85,000 of which Rs. 4,000 were paid as earnest money. The agreement provided that the balance should be paid on completion which was to take place in two months and that if the appellant did not pay within the fixed time, he should forfeit the deposit and the respondent should be at liberty to re-sell the land. On 6th October 1911, when the appellant's reasonable requisitions as to title had not been complied with, the respondent purported to rescind the contract and forfeit the deposit and yet though the agreement provided that in case the appellant failed to pay Rs. 81,000 within two months, the appellant would forfeit his security and the respondent would be at liberty to re-sell the land, their Lordships held that the contract did not make time of the essence of contract and that the appellant was entitled to specific performance. Their Lordships, after referring to the cases of *Tilley v. Thomas*, (1867) 3 Ch. 61 : (17 L. T. 422) and *Roberts v. Berry*, (1853) 3 De. G. M. & G. 284 at p. 289 : (22 L. J. Ch. 398), observe (p. 32):

"Their Lordships will add to the statement just quoted these observations. The special jurisdiction of equity to disregard the letter of the contract in ascertaining what the parties to the contract are to be taken as having really and in substance intended as regards the time of its performance may be excluded by any plainly expressed stipulation. But to have this effect the language of the stipulation must show that the intention was to make the rights of the parties depend on the observance of the time limits prescribed in a fashion which is unmistakable. The language will have this effect if it plainly excludes the notion that these time limits were of merely secondary importance in the bargain, and that to disregard them would be to disregard nothing that lay at its foundation. *Prima facie*, equity treats the importance of such time limits as being subordinate to the main purpose of the parties, and it will enjoin specific performance notwithstanding that from the point of view of a Court of law the contract has not been literally performed by the plaintiff as regards the time limit specified. This is merely an illustration of the general principle of disregarding the letter for the substance which Courts of Equity apply, when, for instance, they decree specific performance with compensation for a non-essential deficiency in subject-matter."

Now, this case has been followed by our High Court in *Kalu v. Narayan*, 29 Bom. L. R. 56 : (A. I. R. (14) 1927 Bom. 111). The facts in that

case are very similar to the facts in the present case. The defendants in that case had agreed to sell their lands to plaintiffs and stipulated that the consideration money was to be paid after four years from the date of the agreement. At the same time, the plaintiffs executed a rent note for a period of four years and continued in possession of the lands. After the expiry of the period, the defendant filed a possessory suit on the rent note and recovered possession and then the plaintiffs sued for specific performance of the contract. There it was held that "under the circumstances, time was not of the essence of the contract." Now in this case, as in our case, the plaintiffs had first filed a suit for redemption of the mortgage, and when that suit was dismissed, he filed the present suit for specific performance of the agreement, and their Lordships observed (p. 58) :

"It is quite true that the property in question originally belonged to the plaintiffs' father but it was sold to defendants' father in 1904; and as this contract was entered into in 1917, it is difficult to treat it as connected with the sale of 1904, and as an agreement of re-purchase. In fact, it is an independent transaction: It might have been induced by the consideration that originally the property belonged to the plaintiffs' father, but it cannot, on that account, be treated as connected in any way with the transaction of 1904. The contract in terms purports to be a contract for the sale of immovable property and certain period is stated, after which the payment contemplated under the contract is to be made. Such a contract is not any the less an ordinary contract of sale simply because the intending purchaser was the original owner of the property some years ago. The contract in terms does not refer to the transaction of 1904. Treating it as an ordinary contract of sale, it seems to us that the lower appellate Court was right in holding that the observations in *Jamshed's case*, 43 I. A. 26: (A. I. R. (2) 1915 P. C. 83), which have been above referred to, would be applicable to such a contract."

It may be noted that in this case the plaintiff had executed a rent note for a period of four years and continued in possession of the lands as tenants, and under the circumstances the Court came to the conclusion that the intention of the parties was that time was not of the essence of the contract. Now, applying these principles to the facts of our case, we hold that as the amount of the defendant was allowed to earn interest, the parties regarded that time was not of the essence of the contract. If that be so, the present suit, which has been filed within three years from the expiry of the period within which the amount was to be paid, is in time, and there is no reason why the agreement to sell should not be specifically enforced.

[10] The learned trial Judge has passed a decree in favour of the plaintiff in these terms:

"It is declared that plaintiff is entitled to recover possession of the property mentioned in the plaint after he pays in Court a sum of Rs. 2000 and interest on Rs. 2000 from 29th October 1934 to the date the

defendant got possession by Civil Decree No. 884 of 1939 in execution of the decree in Civil Suit No. 132 of 1939 if the defendant expresses his intention in writing not to claim the amount of rent and mesne profits given to him by the aforesaid decree. The defendant, if he wants this relief, must make the election within two months from this date and inform the Court of it within that period."

Now, with regard to this latter part of the decree, it is contended by Mr. J. C. Shah that the defendant was the owner of the property and he was therefore entitled to recover the income of the property which was let to the plaintiff, and in addition to this, as the plaintiff had agreed to pay interest on Rs. 2000 at any time when he exercised the option within three years of purchasing the property, he is entitled both to the rent as well as interest on the property. But we are not prepared to accept this contention. The real intention appears to be that the defendant was to be paid interest in the form of rent. The consideration for purchase was not to increase as time went on. Only interest on Rs. 2000 was to be paid, and this interest took the form of the rent of the land which the plaintiff had taken under the rent note. We, therefore, hold that the defendant must be put to his election. Either he should receive the interest on Rs. 2000 or he should be prepared to execute the decree which he had obtained. We, therefore, confirm this part of the decree.

[11] Then there are certain other observations made by the learned Judge with regard to the exact form of the decree. He says that as the sale deeds stand in the name of the defendant's minor son Chandrakant, the defendants should obtain the consent of the minor for the sale of this property, and until that is done, he is not entitled to recover the amount paid by the plaintiff in Court. We, however, think that this arrangement is not at all necessary, because the defendant has stated in his own evidence that he purchased the property in the name of his minor son and that the money belonged to his wife. That means that he concedes that Chandrakant was only a *benamidar* for him and further the defendant himself, as owner of the property, entered into the agreement with the plaintiff for the sale of the property and defendant in his own name took the rent note from the plaintiff. These circumstances show that Chandrakant was only a *benamidar* for the defendant, and it is not necessary that the defendant should produce a consent of the minor in writing before he is entitled to withdraw the amount deposited by the plaintiff.

[12] The result is that we substitute in place of the decree passed by the lower Court the decree in the following terms: (1) That it is declared that the plaintiff is entitled to have the agree-

ment of sale dated 29th October, 1934, set out in Ex. 42 in the suit specifically enforced, and it is directed that the defendant do convey within two months from the date of receipt of record and proceedings in the lower Court the properties mentioned in the said agreement to the plaintiff and put him in possession of the same. In case the defendant makes default, the plaintiff may get the conveyance executed through the Court and recover possession in execution. (2) That the plaintiff do deposit the sum of Rs. 2000 with interest thereon in Court within one month of the receipt of the record by the trial Court if he has not already deposited the amount. (3) That the defendant will be entitled to interest on the said sum of Rs. 2000 at the rate agreed upon from 29th October 1934 up to 29th October 1940 on which date he recovered the possession of the whole property in execution of the decree in suit No. 132 of 1939. Any amount recovered by the defendant for rent in execution of the said decree to be set off against the amount of interest. The said amount shall be deposited by the plaintiff within one month of the receipt of the record by the trial Court. On such deposit being made, the decree for rent in suit No. 132 of 1939 shall be deemed to be satisfied. (4) That the defendant will pay the costs of the appeal to the plaintiff. The plaintiff is entitled to the costs of the suit. The order regarding the payment of the court-fee to Government as framed by the lower Court will stand. (5) In the event of the plaintiff's failure to deposit the amount in Court as mentioned above, his suit shall stand dismissed with costs and there will be no order of costs in appeal.

D.H.

Order accordingly.

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CHAGLA C. J. AND BHAGWATI J.

Mulchand Kundanmal Jagtiani — Plaintiff v. Raman Hirshah — Defendant.

O. C. J. Suit No. 1859 of 1948, and Misc. Application No. 231 of 1938, Decided on 2nd September 1948.

(a) Government of India Act (1935), S. 100 — Whether there is encroachment of legislation in forbidden field — Pith and substance of legislation has to be considered — What is pith and substance argument, considered — Interpretation of statutes — Ultra vires — Pith and substance.

In order to see whether a particular legislation has encroached upon the forbidden field, the Court must look at the true nature and the effect of the legislation. It must consider its scope and ambit, it must consider its true aspect from the point of view of the Legislature and must come to the conclusion what is the legislation about. It must not be misled by mere technicalities or by legal phraseology which may conceal the true intent of the Legislature, but must fairly arrive at a conclusion as to what is the true nature and character of the legislation which it is considering. In other words the Court must consider the pith and substance of the legislation. [Para 5]

Although it is not always wise to construe the Indian Constitution Act by analogy with the Canadian or the Australian Constitution Acts, even so both in the interpretation of the Canadian and the Australian Acts and in the Indian Act the pith and substance argument fully applies. When different subjects are mentioned in different lists subjects are bound to overlap, and when they do overlap, what the Court must do is to find out what is the nature of the enactment in pith and substance and in which list does it fall according to its true nature and character. A Provincial Act may encroach upon the Federal field, but what the Court must do is to determine the extent of that invasion and the Court must do so in order to find out whether in pith and substance the legislation really falls in the Provincial field. The mere fact that there is a trespass by the Provincial Legislature upon the Federal field does not necessarily make the Provincial legislation *ultra vires*. The extent and nature and character of the trespass must be considered, and if the Court finds that the trespass is such as to make the legislation really a legislation which falls in one of the items in List I then alone the Court would say that the legislation is *ultra vires*. The Provincial Legislature may deal with a Federal subject if it is only an ancillary or incidental effect of the legislation, provided that in substance it is dealing with a Provincial subject. If, on the view of the statute as a whole, the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field : A. I. R. (34) 1947 P. C. 60 ; A. I. R. (28) 1941 F. C. 47 ; (1937) A. C. 863 and A. I. R. (31) 1944 F. C. 18, *Rel. on.* [Paras 5, 7]

Annotation : ('46-Man.) Government of India Act, S. 100 N. 1.

(b) Bombay City Civil Courts Act (XL [40] of 1948), Ss. 30 and 18— Act is not *ultra vires* the Provincial Legislature to the extent that it confers jurisdiction on City Civil Court to receive, try and dispose of suits in respect of cheques, bills of exchange and promissory notes not exceeding Rs. 10,000 in value and to extent that it takes away jurisdiction of High Court to try such suits—Act sets up additional City Civil Court for greater Bombay — Court is not a Special Court — Act deals with administration of justice and is covered by item 1 of List II, Sch. VII, Government of India Act — Act does not deal with matters falling under item 28 of List I — City Civil Court trying suit on promissory notes—There is no invasion of Federal field — No express jurisdiction to try such suit is conferred — Invasion is incidental and ancillary — Government of India Act (1935), S. 100, Sch. VII, List I entry 28, List II Entries 1 and 2.

The Act is intended for the purpose of setting up an additional civil Court for greater Bombay to try the suit in matters up to Rs. 10,000. It is not a Court of special jurisdiction. No special jurisdiction is conferred upon it, and with regard to subject-matter it is competent to try all civil suits excepting certain matters. It cannot be said of this piece of legislation that it confers jurisdiction and powers upon the City Court to deal with cases falling under item 28 (cheques etc.) of List I. If, therefore, the Act deals with administration of justice and constitutes a Court for that purpose and confers ordinary civil jurisdiction upon it, the legislation clearly falls within the legislative competence of the Provincial Legislature and is covered by item I of List II of Sch. 7. Item I having given the general power to the Provincial Legislature with regard to all matters of administration of justice and with regard to the constitution and organisation of all Courts,

further gives the power to the Legislature to confer special jurisdiction, if needs be, and special power, if needs be, to these Courts with regard to any of the items mentioned in List II. It is impossible to read item 2 as curtailing and restricting the very wide powers with regard to administration of justice given to the Provincial Legislature under item 1. Item 1 is not limited and conditioned by item 2 and it cannot be contended that the only power that the Provincial Legislature has is to create Courts, and to confer upon them only such jurisdiction as relates to items comprised in List II. Each item in List II is an independent item, supplementary of each other, and not limited by each other in any way. To say that because the City Civil Court will be trying suits on promissory notes, therefore there is an invasion of the Federal field and jurisdiction has been conferred by the Provincial Legislature upon the Court to try suits on promissory notes, is taking an erroneous view of the Act. Assuming that there has been an invasion of the Federal field to the extent that a new Court which has been set up has been clothed with the power of trying suits on promissory notes, that invasion is purely incidental or ancillary. If the Provincial Legislature has ventured at all to trespass upon the Federal field, that trespass is of the most minor and immaterial character, and when one considers the nature of that trespass, if anything, the fact is emphasised that what the Legislature was doing in substance was legislating in a matter which is exclusively within its own sphere and not within the sphere of the Federal Legislature. It cannot for a moment be suggested that by any guise or contrivance the Provincial Legislature has attempted to do what it had no power to do and what only the Federal Legislature had the power. If the legislation falls within item 1 of List II, then not only would the Provincial Legislature have the power of conferring jurisdiction in all matters up to Rs. 10,000 on the City Civil Court, but it would equally have the power to deprive the High Court of that same jurisdiction. The Provincial Legislature had power to confer upon the civil Court the jurisdiction to entertain and try suits in respect of negotiable instruments of the value of and below Rs. 10,000 and therefore the impugned Act is *intra vires* of the Provincial Legislature. [Paras 8, 8a, 9]

Annotation : ('46-Man.) Government of India Act, Sch. VII List I, Entry 28 N. 1; List II, Entry 1 N. 1.

(c) Government of India Act (1935), Sch. VII, List II, Entries 1 and 2 — Entry 1 is not limited or conditioned by Entry 2, to entries mentioned in List II — Entry 2 does not curtail or restrict very wide power with regard to administration of justice given to Provincial Legislature under Entry 1. [Para 8]

(See Pt. b).

G. N. Joshi, Murzban J. Mistree and N. A. Palkhiwala — for Plaintiff.

M. P. Amin Advocate General and M. M. Desai — for the Province of Bombay.

S. T. Desai and P. J. Kapadia — for Defendant.

Murzban J. Mistree and N. A. Palkhiwala — for Petitioner.

Chagla C. J. — The plaintiff filed a suit on 2nd July 1948, on two promissory notes. A plaint was also prepared in respect of a suit on a promissory note on 27th August 1948, and an application was made to take that suit on the file of this Court, and the question that arises both in the suit and in the application is whether this Court has jurisdiction to try these two suits, and the question of jurisdiction can only be deter-

mined by considering whether a recent piece of legislation passed by the Provincial Legislature is *intra vires* with regard to certain of its provisions.

[2] Bombay Act XL [40] of 1948, an Act to establish an additional City Civil Court for Greater Bombay, received the assent of the Governor General on 10th May 1948, and the Act came into force on 16th August 1948. The material provisions of the Act are that it sets up an additional Civil Court for the Greater Bombay for the trying of all suits of a civil nature not exceeding Rs. 10,000 in value and arising within the Greater Bombay. In S. 3 of the Act, certain kinds of suits are excluded from the purview of this new Court, but we are not concerned with those excepted suits. Section 12 bars the jurisdiction of this Court in all those suits which are made cognizable by the City Civil Court. Therefore, the position is that whereas before the passing of this Act the High Court had jurisdiction to try all suits from Rs. 1,000 upwards on its original side, now suits up to the value of Rs. 10,000 would be solely triable by the City Civil Court. Section 18 provides for the transfer of suits pending in the High Court, and the effect of that section is that all suits, which were pending in this Court in which issues had not been settled or evidence had not been recorded on or before the date of the coming into force of the Act, were to be transferred to the new Court which was established.

[3] Now, the contention, very briefly put, of the plaintiff and the petitioner before us, is that it is not within the legislative competence of the Provincial Legislature to invest this new Court with the jurisdiction to try suits on promissory notes, nor is it within the legislative competence of the Provincial Legislature to deprive the High Court of its jurisdiction to try suits on promissory notes below the value of Rs. 10,000. In order to fully understand and appreciate this contention it is necessary to look at the scheme of the Government of India Act. The scheme of the Constitutional Act has been considered over and over again both by the Federal Court and by the Privy Council, and I do not think it will be right on my part to repeat and reiterate what have now come to be regarded as truisms in the interpretation of the Constitutional Act. The basic and fundamental idea underlying the Government of India Act is the creation of a Federation, and as is well known, Federation means distribution of powers, and the scheme adopted in the Government of India Act is that legislative power is distributed between the Centre and the Provinces and the distribution is brought about in this way. Three Lists are prepared : List I which deals with subjects over which the

Centre alone has the legislative competence; List III which is the Concurrent List with regard to which both the Centre and the Provinces can legislate; and List II which is a purely Provincial List in regard to which only the Provincial Legislature can legislate. Section 100 deals with these Lists and the scheme of S. 100 also is fairly clear. It, as it were, lays down a hierarchy of these Lists. It gives priority to the different Lists and it provides that the dominant List shall be the Federal Legislative List; next comes the Concurrent Legislative List; and finally comes the Provincial Legislative List. It is also now a well-recognised canon of construction that as far as possible attempt should be made to reconcile different items in different Lists so as to avoid a conflict and overlapping and also that full effect must be given to each item in each of the Lists.

[4] Now, turning to these Lists, Mr. Joshi has argued that these Lists display a peculiar feature in our Constitution, that whereas the distribution of legislative and executive power is carried out, as is ordinarily carried out in most Federal Constitutions, by dividing the subjects between the Federation and the Provinces, with regard to the distribution of judicial power the scheme presents certain novel features. The administration of justice is made a Provincial subject. It falls under List II, item 1, and the constitution and organisation of all Courts are also within the legislative competence of the Province. But Mr. Joshi contends that as far as the jurisdiction of the Courts set up by the Provinces is concerned, that is distributed between the Province and the Federation. Before the passing of the Act of 1935 India was governed by a unitary constitution and therefore the question of distribution of powers did not arise, and so by S. 223 of the Act the jurisdiction of existing High Courts has been saved. But according to Mr. Joshi, with regard to the future the Courts in India can only derive their power and their jurisdiction with regard to different subjects according as those subjects are Federal subjects or Provincial subjects or fall in the Concurrent List. It is pointed out to us that in List I, the Federal List, item 53 provides with regard to jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this List and, to such extent as is expressly authorised by Part 9 of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers. Therefore item 53 confers upon the Federal Legislature the sole power of the conferring jurisdiction and power upon all Courts with respect to each one of the items that figure in List I. Mr. Joshi says that that power cannot be encroached upon by

the Provincial Legislature. That establishes the paramountcy of the Federation, and although the Provinces may set up new Courts, the Federal Legislature alone can confer jurisdiction upon those Courts with regard to the items enumerated in List I. Then we turn to List II, which is the Provincial List, and there too we have a similar provision, being item 2, which states: "Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list," and says Mr. Joshi that under this power the Provincial Legislature can confer jurisdiction and that Legislature alone can confer jurisdiction upon the Courts set up by the Province with regard to matters enumerated in List II. And in the Concurrent List we have item 15 which also speaks of jurisdiction and powers of all Courts with respect to any of the matters in this list, and here both the Province and the Federation can confer jurisdiction and power upon the Courts. Mr. Joshi and also Mr. Mistree therefore argue that inasmuch as promissory notes is item 28 in List I, it is only the Federal Legislature that can confer jurisdiction upon the City Civil Court to hear and dispose of suits on promissory notes, and it is also only the Federal Court that can deprive the High Court of its jurisdiction to hear suits on promissory notes.

[5] Now, in order to determine whether the impugned legislation falls within List I and therefore *ultra vires* of the Provincial Legislature, we have to consider what the nature of the legislation is. It is entirely fallacious to argue, as was sought to be argued at one stage, that the well-known argument of pith and substance does not apply to the case before us. The pith and substance argument really amounts to this. The Court must look at the true nature and effect of the legislation which it is considering. It must consider its scope and ambit, it must consider its true aspect from the point of view of the Legislature and must come to the conclusion what is the legislation about. It must not be misled by mere technicalities or by legal phraseology which may conceal the true intent of the Legislature, but must fairly arrive at a conclusion as to what is the true nature and character of the legislation which it is considering. The Privy Council in a very recent case has very clearly enunciated this principle. The decision is to be found in *Prafulla Kumar Mukherjee v. Bank of Commerce Ltd., Khulna*, 74 I. A. 23 : (A I.R. (34) 1947 PC. 60). The judgment was delivered by Lord Porter, and it would indeed be audacity of the highest order for me to try and improve upon what has been so lucidly and succinctly stated by Lord Porter as the true principles which should govern the consideration of whether

a particular piece of legislation is *ultra vires* or not. Reading the Privy Council case I find certain principles that emerge which I will briefly state. The first is that although it is not always wise to construe the Indian Constitution Act by analogy with the Canadian or the Australian Constitution Acts, even so both in the interpretation of the Canadian and the Australian Acts and in the Indian Act the pith and substance argument fully applies. The second principle that emerges is that when you have different subjects mentioned in different lists, subjects are bound to overlap, and when they do overlap, what the Court must do is to find out what is the nature of the enactment in pith and substance and in which List does it fall according to its true nature and character. The Privy Council also clearly asserts that a Provincial Act may encroach upon the Federal field, but what the Court must do is to determine the extent of that invasion and the Court must do so in order to find out whether in pith and substance the legislation really falls in the Provincial field. The mere fact that there is a trespass by the Provincial Legislature upon the Federal field does not necessarily make the Provincial legislation *ultra vires*. The extent and nature and character of the trespass must be considered, and if the Court finds that the trespass is such as to make the legislation relays a legislation which falls in one of the items in List I, then alone the Court would say that the legislation is *ultra vires*. Finally, the main principle laid down in this case of the Privy Council is that the Provincial Legislature may deal with a Federal subject if it is only an ancillary or incidental effect of the legislation, provided that in substance it is dealing with a Provincial subject.

[6] It is interesting to note what the facts were in the case which came before the Privy Council and in which these principles were enunciated by their Lordships. The Act that was challenged was the Bengal Money-lenders Act of 1940, and one of the sections of that Act provided that notwithstanding anything contained in any law for the time being in force, or in any agreement, no borrower shall be liable to pay after the commencement of this Act more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest, and the respondent before their Lordships filed the suit, from which the appeal arose, to recover loans and interest alleged to be due on promissory notes executed by the borrowers who were the appellants, and the contention before the Privy Council was that the Bengal Legislature in passing the Money-lenders Act, 1940, had encroached upon the Federal field inasmuch as they had passed legis-

lation which affected promissory notes which fell in List I of Sch. 7. Their Lordships felt that three questions arose in order to determine whether the contention of the party challenging the legislation was sound, and these three questions were: (1) Does the Act in question deal in pith and substance with money lending? (2) If it does, is it valid though it incidentally trenches on matters reserved for the Federal Legislature? (3) Once it is determined whether the pith and substance is money lending, is the extent to which the Federal field is invaded a material matter? And their Lordships' answer was that the Act dealt in pith and substance with money lending and therefore it was valid although it incidentally trespassed on matters reserved for the Federal Legislature, and finally that once it was determined that the pith and substance was money-lending, the extent to which the Federal field was invaded was not a material consideration. In connection with the second question, their Lordships cited with approval an observation of Sir Maurice Gwyer C.J. in *Subrahmanyam Chettiar v. Muttuswami Goundan*, 1940 F.C. R. 188: (A. I. R. (28) 1941 F. C. 47) (p. 201):

"It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its 'pith and substance,' or its 'true nature and character,' for the purposes of determining whether it is legislation with respect to matters in this list or in that."

Dealing with the same point their Lordships observed (p. 43):

"Subjects must still overlap, and where they do the question must be asked what in pith and substance is the effect of the enactment of which complaint is made, and in what list is its true nature and character to be found. If these questions could not be asked, much beneficent legislation would be stifled at birth, and many of the subjects entrusted to provincial legislation could never effectively be dealt with."

With regard to the third question their Lordships stated that it was not necessary to determine degrees of invasion, but to consider invasion from the point of view of deciding what the pith and substance of the impugned Act was, and they go on to say (p. 43):

"Its provisions may advance so far into Federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, has it trespassed more or less, but is the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not money-lending but promissory notes or banking? Once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content."

And their Lordships further emphasised that the view that they had just been expressing places the precedence accorded to the three Lists in its proper perspective.

[7] Lord Atkin in a passage, which has come to be regarded as a *locus classicus*, also defined what the pith and substance argument really is and that is in *Gallagher v. Lynn*, (1937) A. C. 863 : (1937-3 ALL E. R. 598) and the passage is at p. 870:

"If, on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorised field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

And the Federal Court in *Bank of Commerce Ltd. v. Amulya Krishna Basu : Bank of Commerce Ltd. v. Brojo Lal Mitra*, 1944 F. C. R. 126 at pp. 139, 140 : (A. I. R. (31) 1944 F. C. 18), have also considered what must be the true approach to legislation which is challenged as being beyond the competence of a particular legislative authority, and the Chief Justice of India Sir Patrick Spens, quotes with approval from Lefroy's *Treatise on Canadian Constitutional law*. Lefroy says that:

"It seems quite possible that a particular Act, regarded from one aspect, might be *intra vires* of a Provincial Legislature, and yet, regarded from another aspect, might be also *intra vires* of the Dominion Parliament. In other words, what is properly to be called the subject-matter of an Act may depend upon what is the true aspect of the Act."

And the learned author goes on to define what aspect means and says:

"The cases which illustrate this principle show, by 'aspect' here must be understood the aspect or point of view of the legislator in legislating, the object, purpose and scope of the legislation. The word is used subjectively of the legislator rather than objectively of the matter legislated upon."

[8] Armed with these tests let us look at the legislation which is being challenged and let us try and determine what is its pith and substance, its true nature and character, its scope and ambit. As its very preamble shows, the Act is intended for the purpose of setting up an additional civil Court for Greater Bombay. The Legislature has created a Court of a lower grade than the High Court for certain suits of a certain pecuniary value. The Legislature has taken the view—rightly or wrongly is immaterial—that litigation of a certain value should not be dealt with by the High Court on its Original Side, but should be dealt with by a special civil Court which is established by the Legislature. It is important to note that this Court is not a special Court in any sense of the term. It is a civil Court like any of the several Courts existing in the Province of Bombay. No special jurisdiction

is conferred upon it, and with regard to subject-matter it is competent to try all civil suits excepting certain matters where the jurisdiction of the High Court is continued, like the Admiralty, Matrimonial, Testamentary and Insolvency jurisdiction. It is difficult to understand how it can be said of this piece of legislation that it confers jurisdiction and power upon the City civil Court to deal with cases falling under Item 28 of List I. If, therefore, the Act deals with administration of justice and constitutes a Court for that purpose and confers ordinary civil jurisdiction upon it, in my opinion, the legislation clearly falls within the legislative competence of the Provincial Legislature and is covered by Item 1 of List II of Sch. 7. That item expressly confers upon the Provincial Legislature the power to legislate with regard to the administration of justice and the constitution and organisation of all Courts except the Federal Court. It is difficult to imagine how a Court can be constituted without any jurisdiction, and if Parliament has made the administration of justice exclusively a Provincial subject and has conferred exclusively upon the Provincial Legislature the power to constitute and organise all Courts, it must follow that the power is given to the Provincial Legislature to confer the ordinary civil jurisdiction upon the Courts to carry on with their work. Item 2 of List II deals with jurisdiction and power of all Courts except the Federal Court with respect to any of the matters in this List, and Mr. Mistree's argument is that Item 1 is limited and conditioned by Item 2 and what he contends is that the only power that the Provincial Legislature has is undoubtedly to create Courts, but to confer upon them only such jurisdiction as relates to items comprised in List II. I am unable to accept that contention or that interpretation of List II in Sch. 7. Each item in List II is an independent item, supplementary of each other, and not limited by each other in any way. Item 1 having given the general power to the Provincial Legislature with regard to all matters of administration of justice and with regard to the constitution and organisation of all Courts, further gives the power to the Legislature to confer special jurisdiction, if needs be, and special power, if needs be, to these Courts with regard to any of the items mentioned in List II. It is impossible to read item 2 as curtailing and restricting the very wide power with regard to administration of justice given to the Provincial Legislature under item 1. Similarly in List I the Federal Legislature has been given the power under item 53 to confer jurisdiction and power upon any Court with regard to matters falling under any of the items in that

List, and, therefore, it would be competent to the Federal Legislature to confer any special jurisdiction or power which it thought proper upon any Court with regard to suits on promissory notes or matters arising under the Negotiable Instruments Act. The conferment of such special jurisdiction and powers with regard to negotiable instruments would be solely and entirely within the competence of the Federal Legislature. To say that because the City Civil Court will be trying suits on promissory notes, therefore, there is an invasion of the Federal field and jurisdiction has been conferred by the Provincial Legislature upon the Court to try suits on promissory notes, is, to my mind, taking an erroneous view of the impugned legislation. It was not the point of view of the Legislature at all that any jurisdiction should be conferred upon the City Civil Court with regard to promissory notes. Assuming that there has been an invasion of the Federal field to the extent that a new Court which has been set up has been clothed with the power of trying suits on promissory notes, in my opinion, that invasion is purely incidental or ancillary. If the Provincial Legislature has ventured at all to trespass upon the Federal field, that trespass is of the most minor and immaterial character, and when one considers the nature of that trespass, if anything, the fact is emphasised that what the Legislature was doing in substance was legislating in a matter which is exclusively within its own sphere and not within the sphere of the Federal Legislature. In this case it cannot for a moment be suggested that by any guise or contrivance the Provincial Legislature has attempted to do what it had no power to do and what only the Federal Legislature had the power. Nothing could have been further from the minds and thoughts of the distinguished Legislators who were responsible for this legislation, than the thought of negotiable instruments and promissory notes.

[8a] Mr. Mistree has also argued that if this interpretation was placed upon Item 1 of List II of Sch. 7, Item 53 of List I would be rendered completely nugatory. Mr. Mistree says that the Provincial Legislature would be able to confer jurisdiction on the new Court set up with regard to all matters which may fall within the Federal field. I do not think that the argument is really sound because, as I have already pointed out, Item 53 deals with the special jurisdiction and powers with regard to certain specified matters which the Federal Legislature has the power of conferring upon all Courts in the Dominion. That power is by no means taken away by the Provincial Legislature acting patently within its own sphere under Item 1 of List II and creat-

ing a Court for the administration of justice and conferring upon that Court, not any special powers, not any special jurisdiction, but jurisdiction which every civil Court in the Province has under the Civil Procedure Code. This apprehension of the Provincial Legislature stealthily taking away the powers of the Federal Legislature, I am afraid, is based on a misunderstanding and misappreciation of the real effect and content of Item 53 of List I of Sch. 7. It is not disputed either by Mr. Joshi or by Mr. Mistree that if the legislation falls within Item 1 of List II, then not only would the Provincial Legislature have the power of conferring jurisdiction in all matters up to Rs. 10,000 on the City Civil Court, but it would equally have the power to deprive the High Court of that same jurisdiction.

[9] In my opinion, therefore, the Provincial Legislature had power to confer upon the City Civil Court the jurisdiction to entertain and try suits in respect of negotiable instruments of the value of and below Rs. 10,000 and that the impugned Act is *intra vires* of the Provincial Legislature. Therefore this Court would have no jurisdiction to try the Suit No. 1859 of 1948 and that suit must stand transferred to the City Civil Court under S. 18 (1) of the Act.

[10] With regard to the Petition No. 231 of 1948, as we cannot accede to that petition, the suit cannot be taken on the file of this Court, because after the coming into force of the Act on 16th August 1948, that suit can only be tried by the City Civil Court as its value is under Rs. 10,000.

[11] **Bhagwati J.**—The question that arises for our determination is whether this Court has jurisdiction to receive, try and dispose of the suits in respect of promissory notes not exceeding Rs. 10,000 in value. Suit No. 1859 of 1948 was filed on 2nd July 1948. The Bombay Act XL [40] of 1948 was passed by the Bombay Legislature and received the assent of the Governor General on 10th May 1948. It came into force by a notification in the official Gazette by the Provincial Government from 16th August 1948, and on the Act coming into force a notice was put up by the Prothonotary to the effect that the suit would be transferred to the City Civil Court. A precept was thereupon filed by the plaintiff's attorneys contesting this position and contending that this Court had jurisdiction to try and dispose of the suit. On 27th August 1948, another plaint was sought to be presented in respect of a suit on a promissory note of a value not exceeding Rs. 10,000 and that was rejected by the Prothonotary. A petition was thereupon filed, which is Petition No. 231 of 1948, asking that the plaint be taken on file on the

ground that this Court has jurisdiction to receive, try and dispose of that suit. It is on these precept and the petition that the issue as to jurisdiction of this Court has come to be tried before us.

[12] The provisions of the Bombay Act XL [40] of 1948, hereinafter referred to as the impugned Act, which are relevant for the purpose of the determination of this issue, may be referred to in short. The Act has been enacted by the Provincial Legislature to establish an additional civil Court for Greater Bombay. Section 3 of the Act enables the Provincial Government to establish for the Greater Bombay a Court to be called the Bombay City Civil Court, and it enacts that "notwithstanding anything contained in any law, such Court shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding ten thousand rupees in value, and arising within the Greater Bombay," except for certain exceptions which are not relevant in these proceedings. Section 4 empowers the Provincial Government by notification in the official Gazette, to invest the City civil Court with jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature arising within the Greater Bombay and of such value not exceeding twenty-five thousand rupees as may be specified therein. Section 12 of the Act says that "notwithstanding anything contained in any law, the High Court shall not have jurisdiction to try suits and proceedings cognizable by the city Court: Provided that the High Court may, for any special reason, and at any stage remove for trial by itself any suit or proceeding from the city Court." And S. 18 (1) of the Act provides for a transfer of all suits and proceedings cognizable by the city Court and pending in the High Court, in which issues have not been settled or evidence has not been recorded on or before the date of the coming into force of this Act, to the city Court. These are the relevant provisions of the impugned Act on which the questions to be determined by us arise. These questions may be stated as under: First, whether the Bombay City Civil Court Act of 1948, to the extent that it confers jurisdiction on the Bombay City Civil Court to receive, try and dispose of suits in respect of cheques, bills of exchange, promissory notes and other like instruments not exceeding Rs. 10,000 in value is *ultra vires* the Provincial Legislature. Issue 2, which is a cognate issue based on S. 12 of the impugned Act, is whether the Bombay City Civil Court Act of 1948, to the extent that it takes away the jurisdiction of the High Court to receive, try and dispose of suits in respect of cheques, bills of exchange, promissory notes and other like instruments not exceeding Rs. 10,000 in value is *ultra vires* the

Provincial Legislature. A determination of these two issues will result in the determination of the issue as to jurisdiction which has been referred to us.

[13] In order to appreciate the rival contentions which have been urged before us, it is necessary to set out a few provisions of the Government of India Act, 1935, with the various amendments, adaptations and modifications from time to time ending with the Indian Provisional Constitution (Amendment) Order, 1947, hereinafter referred to as the Constitution Act. Part V, Constitution Act, deals with the legislative powers, and Chap. I thereof deals with distribution of powers between the Dominion and the Provincial Legislatures. Section 100 sets out the three lists which are annexed to Sch. 7 to the Act, which are respectively called the Federal Legislative List, the Concurrent Legislative List, and the Provincial Legislative List. It is enacted that so far as the Federal Legislative List is concerned, which is List I to Sch. 7 to the Act, the Dominion Legislature has, and the Provincial Legislature has not, power to make laws with respect to any of the matters enumerated therein. In respect of the Concurrent Legislative List, the Dominion Legislature, and, subject to the preceding sub-section, the Provincial Legislature also, have power to make laws with respect to any of the matters enumerated therein. And, lastly, with regard to the Provincial Legislative List, the Provincial Legislature has, and the Dominion Legislature has not, power to make laws for a Province or any part thereof with respect to any of the matters enumerated therein. These are the lists which contain the distribution of powers between the Dominion and the Provincial Legislatures. Going to the respective lists, there is one particular thing which has got to be observed, and it is this that in all the three lists we have got laid down as specific items jurisdiction and powers of the Court circumscribed as they are by the terms of those particular items. Item 53 of List I refers to the jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list and, to such extent as is expressly authorised by Part IX of this Act, the enlargement of the appellate jurisdiction of the Federal Court, and the conferring thereon of supplemental powers. It may be incidentally noted that the matters in this list, viz., List I, include item 28, viz., cheques, bills of exchange, promissory notes and other like instruments. Item 2 of List II, which is the Provincial Legislative List, again refers to jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this list. Again, it may be noted that item 1 of this list refers to

the administration of justice, constitution and organisation of all Courts, except the Federal Court, and fees taken therein. Item 15 of List III, which is the Concurrent Legislative List, is an item with reference to jurisdiction and powers of all Courts, except the Federal Court, with respect to any of the matters in this list. And again it may be noted that item 4 in this list is Civil Procedure, including the law of limitation and all matters included in the Code of Civil Procedure at the date of the passing of this Act. These are the specific items which have been mentioned as items in relation to the jurisdiction and powers of all Courts in these three respective lists which have been incorporated in Sch. 7 to the Act. One more provision of the Constitution Act which may be noted is contained in S. 223 thereof which refers to jurisdiction of existing High Courts, and it says that :

"Subject to the provisions of this Part of this Act, to the provisions of any Order in Council made under this or any other Act and to the provisions of any Act of the appropriate Legislature enacted by virtue of powers conferred on that Legislature by this Act, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of the judges thereof in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division Courts, shall be the same as immediately before the establishment of the Dominion."

These are the relevant provisions of the Constitution Act which will have to be considered in the later part of this judgment.

[14] It has been contended on behalf of the plaintiff that by enacting S. 3 and S. 12 of the impugned Act, the Provincial Legislature encroached upon the powers of the Dominion Legislature in regard to the enactment of the provisions as regards the jurisdiction and powers of all Courts in regard to item 28 of List I. It is urged that so far as the jurisdiction and powers of all Courts with regard to this item 28 of List I was concerned, any enactment in relation thereto or any amendment of existing powers which were vested in the High Court in relation thereto could only be made by the Dominion Legislature which only had legislative competence in regard to the items contained in List I, and in so far as the Provincial Legislature sought to enact provisions as regards the jurisdiction and powers of all Courts in relation to this item 28 of List I, it trenched upon the powers of the Dominion Legislature and was not competent to do so. No doubt, so far as legislative competence is concerned, it is to be found within the four corners of S. 100, Constitution Act and the Lists which have been annexed to Sch. 7. If the Provincial Legislature had purported to enact in terms any provision

which would affect the jurisdiction and powers of all Courts in relation to item 28 of List I, it certainly was not within its competence to do so, and in so far as it purported to do so, it was certainly an encroachment upon the province of the Dominion Legislature. Legislative competence has got to be determined with reference to these provisions of the Constitution Act; and separate items for making enactments with regard to the jurisdiction and powers of all Courts in relation to the various items of the several Lists have been specifically conferred by virtue of those Lists on the Dominion Legislature and the Provincial Legislatures in regard to items where each of those Legislatures has got exclusive powers. It would follow, therefore, apart from the other considerations which I will advert to later, that the Provincial Legislature had no legislative competence to enact provisions with regard to the jurisdiction and powers of all Courts in relation to item 28 in List I. By S. 3 of the impugned Act, the Provincial Legislature enacted that the new city civil Court which was established by it shall have jurisdiction to receive, try and dispose of suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value and arising within the Greater Bombay, which suits would also include suits based on cheques, bills of exchange, promissory notes and the like instruments which are comprised in item 28 of List I. It can be legitimately contended, as it has been done, that in enacting this provision in S. 3 of the impugned Act the Provincial Legislature trenched upon matters reserved for the Dominion Legislature. The same is the position when the Provincial Legislature enacted S. 12 of the impugned Act which took away from the High Court the jurisdiction to try suits and proceedings cognizable by the City Civil Court. That provision was also not competent to the Provincial Legislature to enact because it was a provision with regard to the jurisdiction and powers of the civil Courts in relation to matters comprised in item 28 of List I. Speaking for myself, I am of opinion that in enacting these provisions in Ss. 3 and 12 of the impugned Act the Provincial Legislature did certainly trench upon matters reserved for the Dominion Legislature. No doubt, the administration of justice and the constitution and organisation of all Courts except the Federal Court and fees taken therein were within the exclusive province of the Provincial Legislature. It was also competent to the Provincial Legislature when establishing the City Civil Court to define its jurisdiction and powers, because it would not be possible to constitute a Court merely as a Court without enacting what the jurisdiction and powers of that Court should be. But while bringing

into existence that Court and investing that Court with jurisdiction and powers it was, according to the strict letter of the law, not competent to the Provincial Legislature to trench on matters reserved for the Dominion Legislature within List I. In my opinion, therefore, in enacting these provisions in Ss. 3 and 12 of the impugned Act the Provincial Legislature did trench on matters reserved for the Dominion Legislature.

[15] The next point, however, to consider is, whether, even though in enacting these provisions the Provincial Legislature did trench on matters reserved for the Dominion Legislature, the provisions which have been enacted in this behalf by the Provincial Legislature are *ultra vires* the Provincial Legislature. It may be noted that the Provincial Legislature has not in terms purported to enact any provisions as regards the jurisdiction and powers of City Civil Court in relation to Item 28 of List I, viz., cheques, bills of exchange, promissory notes and the instruments of like nature. It has, no doubt, enacted provisions as regards the jurisdiction and powers to be exercised by the new City Civil Court which it has established and one has got to consider what are the consequences of enacting provisions of the nature which have been challenged as *ultra vires* the Provincial Legislature in the terms which have been incorporated in Ss. 3 and 12 of the impugned Act. It is in this connection that the argument of pith and substance of the impugned legislation assumes particular importance. In considering whether the impugned legislation is *ultra vires*, one has got to see what is the object, purpose and scope of the legislation, and one has also got to see what is the true nature and extent of the encroachment upon matters which may be reserved for the Dominion Legislature. In regard to this argument as regards the pith and substance, I can do no better than quote a passage from the judgment of the House of Lords in *Gallagher v. Lynn*, (1937) A. C. 863: (1937-3 ALL E. R. 598) at p. 870:

"These questions affecting limitation on the legislative powers of subordinate parliaments or the distribution of powers between parliaments in a federal system are now familiar, and I do not propose to cite the whole range of authority which has largely arisen in discussion of the powers of Canadian Parliaments. It is well established that you are to look at the 'true nature and character of the legislation': *Russell v. The Queen*, (1882) 7 A. C. 829: (51 L. J. P. C. 77) 'the pith and substance of the legislation'. If on the view of the statute as a whole, you find that the substance of the legislation is within the express powers, then it is not invalidated if incidentally it affects matters which are outside the authorized field. The legislation must not under the guise of dealing with one matter in fact encroach upon the forbidden field."

The same observations are to be found in the recent judgment pronounced by their Lordships

of the Privy Council in *Prafulla Kumar Mukherjee v. Bank of Commerce, Ltd., Khulna*, 74 I. A. 23: (A. I. R. (34) 1947 P. C. 60). The legislation which came for consideration before their Lordships of the Privy Council there was the Bengal Money-lenders Act, 1940, and it was impugned on the ground that certain provisions therein contained trenching upon matters reserved for the Federal Legislature in Items 28 and 38 of List I. Their Lordships in connection with this matter framed three particular questions which the Court should address itself to before arriving at a conclusion whether the provisions of the impugned Act are *ultra vires* and adopting the very same phraseology I also would ask myself the same three questions in connection with the impugned Act before us, viz., (1) Does the Act in question deal in pith and substance with the jurisdiction and powers of the City Civil Court? (2) If it does, is it valid though it incidentally trenches on matters reserved for the Dominion Legislature in item 28 of List I? (3) Once it is determined whether the pith and substance is the enactment of jurisdiction and powers of the City Civil Court, is the extent to which the Dominion field is invaded a material matter? As regards the first question there is no doubt, on a consideration of items 1 and 2 of List II, that the impugned Act deals in pith and substance with the jurisdiction and powers of the City Civil Court. The main purpose of the enactment of Bombay Act XL [40] of 1948 is the establishment of an additional civil Court for Greater Bombay. You cannot have the establishment of a Court in mere form or name, but you must have a Court which is newly established, as the one before us, clothed with jurisdiction and powers to receive, try and dispose of suits and proceedings. In enacting the jurisdiction and powers within the meaning of item 2 of List II the Bombay Legislature had full and exclusive authority to do so and it had not got to rely upon any other power except the one which is given to it in item 2 of List II. The other provisions of the impugned Act make it clear that the only object, purpose and scope of this piece of legislation which was enacted by the Bombay Legislature was the establishment of the City Civil Court and the investing it with the jurisdiction and powers to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value and arising within the Greater Bombay. In my opinion, therefore, the pith and substance of this impugned Act was the jurisdiction and powers of the City Civil Court which was established by the Bombay Legislature acting within the scope of the powers which were vested in it by Item 1 of List II. As regards the second question, I need not say any-

thing more than what I have stated before that in the enactment of ss. 3 and 12 of the impugned Act the Bombay Legislature incidentally trenched on matters reserved for the Dominion Legislature, in so far as the suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value and arising within Greater Bombay would also comprise within that category suits within that pecuniary limit in respect of or based on cheques, bills of exchange, promissory notes and other instruments of like nature.

[16] This leads me to a consideration of the third question which I have raised above, and that is, even though this sort of trenching on matters reserved for the Dominion Legislature is indulged in, is the extent to which the Dominion field is invaded a material matter so as to convert this piece of legislation into pith and substance, a legislation in respect of jurisdiction and powers of all Courts in relation to item 28 of List I. In that behalf it would be relevant to note the observations of their Lordships of the Privy Council. While discussing this aspect of the case their Lordships observed (p. 43) :

"... the extent of the invasion by the provinces into subjects enumerated in the Federal List has to be considered. No doubt it is an important matter, not, as their Lordships think, because the validity of an Act can be determined by discriminating between degrees of invasion, but for the purpose of determining what is the pith and substance of the impugned Act."

The pith and substance of the impugned Act is not—again to state the proposition in terms of the question before us—the jurisdiction and powers of the Courts in relation to item 28 of List I but the jurisdiction and powers of the City Civil Court; "once that question is determined the Act falls on one or the other side of the line and can be seen as valid or invalid according to its true content." The further observations of their Lordships of the Privy Council comprise the point of view which has got to be adopted in considering this aspect of the case. They observed (p. 44) :

"Does the priority of the Federal legislature prevent the provincial legislature from dealing with any matter which may incidentally affect any item in its list, or in each case has one to consider what the substance of an Act is and, whatever its ancillary effect, attribute it to the appropriate list according to its true character? In their Lordships' opinion the latter is the true view."

This, with respect, is the true criterion for judging whether the provisions of the impugned Act fall within Item 2 of List II or within item 53 coupled with item 28 of List I. In my opinion, the provisions which have been enacted by the Provincial Legislature in ss. 3 and 12 of the impugned Act have to be considered from this point of view and the substance of the impugned Act is to be considered with reference to the second proposition which has been enunciated by their Lord-

ships of the Privy Council. The pith and substance of enactment was the enactment of the jurisdiction and powers of the new City Civil Court which the Bombay Legislature had established, and in enacting that jurisdiction and powers it incidentally trenched upon Item 28 coupled with Item 53 of List I, and the extent of such encroachment upon the province of the Dominion Legislature being immaterial it does not convert the impugned Act or the provisions thereof which have been mentioned above into being in pith and substance an enactment in connection with items 28 and 53 of List I.

[17] Under the circumstances aforesaid, I answer the questions which have been mooted by me above in the negative.

[18] The result will be that this Court has no jurisdiction to receive, try and dispose of suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value and arising out of the Greater Bombay, even in respect of cheques, bills of exchange, promissory notes and instruments of a like nature. I therefore agree with the order proposed by my Lord the Chief Justice.

[19] **Per Curiam.** — Certificate to appeal to the Federal Court under S. 205.

R.G.D.

Answer accordingly.

A. I. R. (36) 1949 Bombay 207 [C. N. 58.]

SEN AND BAVDEKAR JJ.

Dattatraya Vishwanath Sulakhe—Plaintiff — Appellant v. Secretary of State for India and others — Defendants — Respondents.

Second Appeals Nos. 401 and 451 of 1944, Decided on 9th October 1947, from order of Dist. Judge, Sholapur, in Appeal No. 106 of 1941.

Bombay Rent-free Estates Act (1852), Sch. B, R. 8, Proviso 5 and R. 10 — Lands given as kazi inams — Under sanad lands non-transferable and holder to remain loyal — Lands mortgaged by kazi — Government resuming lands from mortgagee for breach of conditions of sanad and restoring them to official kazi — Suit by mortgagee for possession — Government, held, had no power to resume lands by taking executive action — Suit held was not barred under S. 4, Bombay Revenue Jurisdiction Act—Bombay Revenue Jurisdiction Act (1876), S. 4.

The lands in suit were given as kazi inam lands by Aurungzeb in 1670. In 1867 the holders mortgaged the lands. In 1880 a sanad was granted to the family of the kazis by which the holders were to perform the usual service to the community and to remain faithful to British Government. The watan was not to be transferred. In 1930 the Government resumed the lands from the mortgagee for breaking the conditions regarding loyalty and non-transferability and restored them to official kazis. The mortgagee brought a suit for possession and for recovery of Rs. 105 alleged to have been illegally recovered by the kazi, against the Secretary of State for India and the present kazi :

Held that (1) Government had no power under the Act to frame any rules with reference to the resumption of lands given as emoluments of any hereditary office such as kazi. No doubt if a grant was made subject to

certain conditions and if the conditions were broken, *prima facie* Government should have the right to have the grant terminated. But such right did not necessarily mean the power of terminating the grant by executive action. Hence the Government had no power to resume the lands in question : A. I. R. (11) 1924 Bom. 273, *Rel. on.* [Para 3]

(2) The suit was not barred by S. 4 (a), Bombay Revenue Jurisdiction Act, because it had not been shown that the lands were declared by the Provincial Government to be held for service. If the order of the Government be *ultra vires* that was a nullity and cl. 3 would be no bar as it need not be set aside. As regards cl. (1), the claim of Rs. 105 was barred against the Government but not against the kazi. The claim of possession was also against the kazi and not against the Government and hence there was no bar also under cl. (1) of S. 4 (a) : F. A. No. 47 of 1910, *Rel. on* ; *Case law referred.* [Paras 4 and 5]

P. V. Kane — for Appellant.

S. B. Jathar, Asst. Government Pleader and P. S. Joshi — for Respondents 1 and 4, respectively.

Sen J. — The plaintiff-appellant in the first of these two appeals brought a suit against respondent 1 (the Secretary of State for India in Council) and other defendants for a declaration in respect of, and for possession of, six *hissas* of land in three survey numbers, and for recovery of a sum of Rs. 105 alleged to have been illegally recovered by defendant 2. The plaintiffs-appellants in Second Appeal No. 451 of 1944 are defendants 3 and 4 in the first suit and are cousins of the plaintiff in the same suit. Their plaint is similar to that of the appellant in Second Appeal No. 401 of 1944. The two suits were tried together, and there is one judgment of each of the two lower Courts in respect of them. I shall refer in the following judgment, as the plaintiff and the defendants respectively, to the plaintiff and the defendants in the suit out of which Second Appeal No. 401 of 1944 arises. The material facts are these. The lands in suit were given as kazi inam lands to the ancestors of defendants 2 and 5 to 18 by the Emperor Aurungzeb in the year 1670. In 1867, one of the lands was mortgaged to an ancestor of the plaintiff, and later on the other lands were also similarly mortgaged. The mortgage deeds of the subsequent mortgages, however, are not forthcoming. There was an enquiry by the Inam Commission appointed under Act XI [11] of 1852 to enquire into the present kazi inam; and a *sanad* was granted to the family of the kazis in 1880. Therein it was declared that the lands in suit

"shall be continued, so long as village community may require the service, as the service emolument appertaining to the office of gazi on the following conditions. That is to say, that the holders thereof shall perform the usual service to the community and shall continue faithful subjects of the British Government. As this *watan* is held for the performance of service it cannot be transferred and so no *nazarana* will be levied."

In 1914 certain members of the kazi family brought a suit against the members of the plain-

tiff's family for redemption of the mortgage, but it was dismissed in 1915. In 1920, the question of the alienation of these lands was brought up before the District Deputy Collector. In the order that was passed, it was stated that the service to the community was still required and was being performed, and that the lands had been in the possession of one Mr. Sulakhe and his ancestors since 1870. As the alienation was old, it was directed that Mr. Dattatraya Vishwanath Sulakhe should pay the difference between the assessment and the judi every year to Hafjoddin walad Amroddin, Qazi of Barsi, so long as the qazi service was required and performed by him or his agent. It seems that in 1930 the plaintiff, who was a member of the Barsi Municipality, along with four other councillors, tabled a motion in the municipality protesting against the Government's action in arresting certain political leaders and stating that the municipality agreed with the non-co operation movement; that proposal was carried. Two other resolutions were passed as regards the hoisting of the National Flag by the municipality. On this the Collector issued a notice to the plaintiff asking him to show cause why the qazi inam lands in his possession should not be resumed as plaintiff had violated the conditions of the sanad. The Commissioner wrote to Government in 1930 proposing that the order made by the District Deputy Collector should be revised, and that Sulakhe should be evicted from the lands, and that they should be restored to the officiating qazi. Thereupon Government passed a resolution that the kazi inam lands should be resumed from Sulakhe and should be regranted to the kazis on the same terms as before. Accordingly possession of the suit lands was taken away from the plaintiff and they were restored to the officiating kazis. The plaintiff filed the present suit in 1931. The defence of Government (defendant 1) was that the suit was barred under S. 4 (a), Revenue Jurisdiction Act, the Court having no jurisdiction to question the order of resumption passed by Government because the plaintiff had committed two breaches of the conditions of the sanad regarding loyalty and non-transferability.

[2] The trial Court found that the Sulakhes were the owners of the lands in suit by adverse possession, that the condition about the non-transferability was broken, but that Government had no power of resumption, and that the suit was barred by the Revenue Jurisdiction Act, S. 4 (a), cl. (1). Accordingly it dismissed the suit. On appeal to the District Court, the learned District Judge has found that the claim against Government was barred under S. 4 (a), cl. (1), Revenue Jurisdiction Act, that against the other defendants there is no bar under the said Act,

but that the order made by Government in 1930 being an order in revision of the previous order of 1920 was *intra vires*, just and proper; accordingly he has dismissed the appeal.

[3] The sanad in this case, (Ex. 72), declaring that "the lands in suit shall be continued so long as village community may require the services," etc., seems to have been granted after proceedings had been held by the Inam Commission under Act XI [11] of 1852. What was granted appears to be the land and not the revenue, and three conditions appear in the sanad subject to which the lands were allowed to continue with the family of the kazis, namely, the performance of the kazi services, the holders continuing to be faithful subjects of the British Government, and non-transferability of the lands. It is not alleged that the kazi services have ceased to be performed. The grounds on which the order of resumption was made in 1930 are that the plaintiff had ceased to be a faithful servant of the British Government, and that the condition as to the non-transferability had been broken. It may be disputed whether the conclusion of Government as to the plaintiff's remaining a faithful subject to the British Government is correct. But if the transfer was not lawful, the plaintiff could hardly come within the definition of a holder as defined in S. 3, Land Revenue Code, for under the said definition a holder must be lawfully in possession of land. If the plaintiff was not a holder in this sense, it cannot be said that the condition of his remaining a faithful subject of British Government applied to him. There is, however, no doubt as to the last condition having been broken; and the question arises whether in the event of such a breach Government had any powers to resume the lands in suit. On this point we find the following passage in Joglekar's Alienation Manual, 1st Edn., at Para. 98A, p. 75:

"No power is conferred by Act XI [11] of 1852 or Bombay Act II [2] of 1863 to make rules for the resumption of these lands in Khandesh, Deccan and Southern Maratha Districts. No rent should be levied under the above rules in these Districts in respect of these lands in future and only the full assessment should be levied. The orders in G. R. Nos. 4250 dated 28th April 1908 and 8123 dated 10th August 1908 should be modified to this extent and the difference between the full assessment and judi should be paid to the officiator."

In *Patdaya v. Secretary of State*, 25 Bom. L. R. 1160 : (A. I. R. (11) 1924 Bom. 273), their Lordships were concerned with the question whether the order passed by the Collector in respect of a jangam inam, levying rent in excess of the full assessment authorized by Government, was *ultra vires*. The Collector had there apparently acted under the rules framed in 1908 for the resumption of lands. Those rules purported to have been framed under the powers

conferred by Act XI [11] of 1852, Sch. B, Rr. 8 and 10 and by Bombay Act, VII [7] of 1863, S. 2, cl. (3), and other powers in this behalf. The only possible basis for the order made by the Collector in that case was said to be afforded by those rules, no other statutory power having been referred to as justifying the order. Their Lordships remarked that Government had no power under Act XI [11] of 1852 to frame any rules with reference to the resumption of lands given as emoluments of any hereditary office, such as kazis and village joshis. That conclusion appears to be based on an examination of R. 8 under Sch. B to the said Act, under which alone the office of a jangam, like the office of the kazi in the present case, could be dealt with. Rule 8 reads thus:

"All lands authorizedly held by an official tenure which it is evident from local usage was meant to be hereditary, and has been so considered heretofore even though there be no sanads declaring it to be so, — for instance, inams which form the authorized emoluments of any hereditary office, as of kazis, village joshis, etc., and are not merely personal,— are to be continued permanently."

It is under this rule that the present kazi inam appears to have been continued permanently. Proviso 5 to the said rule is as follows:

"The provisions of this rule are not in any way to apply to emoluments continued for service performed to the State, as the service watans of desais, sardesais, nadagudas, deshpanades, patels, kulkarnis, mhars, talavaras, whose claims are to be disposed of according to the rules which are or may be established for the regulation of such holdings."

Rules contemplated by this proviso would be such as would deal with the question of disposal of claims by the holders of service watans, such as desais, sardesais and others, and cannot therefore deal with the question of resumption of lands held by such persons as kazis, village joshis and others referred to in the main body of R. 8. Rule 10 in Sch. B deals with the jagirs, saranjams and other tenures for service to the Crown and tenures of a political nature; but obviously a kazi inam does not come within any of these descriptions. In contrast to these provisions of Act XI [11] of 1852 we have S. 2, cl. (3) of Bombay Act VII [7] of 1863. It reads as follows:

"Lands held for service shall be resumable or continuable under such general rules as the Provincial Government may think proper, from time to time, to lay down."

It appears, therefore, that the resumption rules derive authority very largely, if not solely, from these provisions. Act VII [7] of 1863, however, speaks of those parts of the Bombay Presidency which are not subject to the operation of Act XI [11] of 1852. Act II [2] of 1863, which is intended to provide for the final and summary adjustment of unsettled claims to exemption from

the payment of the land revenue and to fix the conditions for the recognition of titles to such exemption with respect to succession and transfer in those districts of the Bombay Presidency to which the operation of Act XI [11] of 1852 extends, has no provision similar to S. 2, cl. (3) of Act VII of 1863. All that we have been able to find which appears relevant to this matter is a provision in S. 6, cl. (2), and under which lands held wholly or partially exempt from land revenue, on passing to any person not an heir by actual descent from the person to whose heirs the land is declared heritable, or from a person who may establish his title to such exemption, "shall forthwith become and be liable to payment of annual land-revenue at the full assessment." This is similar to the provisions in sub-s. (3) of S. 48, Land Revenue Code, which is as follows:

"Where land held free of assessment on condition of being used for any purpose is used at any time for any other purpose, it shall be liable for assessment."

Action on these provisions was taken by the Deputy Collector in 1920. No statutory authority other than those examined above and the rules of 1908 regarding resumption has been brought to our notice. The question, therefore, arises whether the District Judge was right in holding that the Government have the inherent power in such cases to resume the land. This point was raised in *Patdaya v. Secretary of State*, 25 Bom. L. R. 1160: (A. I. R. (11) 1924 Bom. 273), and was thus dealt with (p. 1167):

"We do not think that unless the powers could be referred to any statutory provision, or any rule which has the force of law, it could be assumed that the Collector would have the power of disturbing the possession of any third parties who may have acquired rights in respect of such lands under the operation of law, as, for example, by adverse possession. Where a third party is found in possession of such lands, either the party interested must sue him for possession; or if the Government feel interested in the restoration of the lands, they may be able to sue the third party for such restoration. We do not express any opinion on this last point. But we think that if these rules are not *intra vires* of the Government as regards such lands as we are concerned with in this case, and if the Collector has no power to disturb the possession of a third party by summarily evicting him or by levying economic rent, the plaintiff is entitled to maintain a suit for the purpose of restraining the Collector from enforcing the order in question."

No doubt if a grant is made subject to certain conditions, and if one or more of those conditions are broken, *prima facie* Government should have the right to have the grant terminated. But such right does not necessarily mean the power of terminating the grant by executive action. It may possibly be enforced, as pointed out above, by Government by filing a suit. In our opinion Government had no power to resume the lands in suit in this case.

[4] The next question for consideration arises out of the provisions of S. 4, Bombay Revenue Jurisdiction Act, X [10] of 1876. The relevant provisions of that section appear to be those contained in cls. (1) and (3) of sub-s. (a). Clause (4), on which reliance was sought to be placed by the learned Assistant Government Pleader, does not apply, because it has not been shown that the lands in suit had been "declared by the Provincial Government or any officer duly authorized in that behalf to be held for service." If the order of the Government be *ultra vires*, that is a nullity; cl. (3) will not be a bar, as it need not be set aside: *Mallappa v. Tukko*, 39 Bom. L. R. 288 : (A. I. R. (24) 1937 Bom. 307); and the reasoning in *Abdullamiyan Abdulrehman v. Government of Bombay*, 44 Bom. L. R. 577 : (A. I. R. (29) 1942 Bom. 257 F. B.),—a case in which bar of S. 11 was sought to be applied will apply.

[5] Coming to cl. (1), it has not been seriously disputed that the lands in suit are "property appertaining to the office of an hereditary officer" recognized under Act XI [11] of 1852, though there are rulings (for instance, *Patali Begum v. Yeshwant*, 47 Bom L. R. 112 : (A. I. R. (32) 1945 Bom. 317), to the effect that the office of a kazi is not hereditary. The important question that arises is, can this suit be said to be or involve "a claim against the Crown." Ordinarily, as pointed out in *Mallappa v. Tukko*, (39 Bom. L. R. 288: A. I. R. (24) 1937 Bom. 307), the words "claim against Government" would imply that a relief of some kind is sought against Government, for instance, possession, a money claim or an injunction, and that Government is not merely a formal party. The reliefs sought in this case, so far as they affect Government, are (1) a declaration that the Government's order is null and void and (2) a sum of Rs. 105 in respect of the income for the years 1930-31, to be awarded from defendants 1 and 2. The second claim is a distinct claim against Government and as such it is barred, though the claim as against defendant 2 will not be barred. As to the first relief sought, it is to be noted that the relief of possession is not sought against Government as was the case in *Appaji v. Secretary of State for India*, 28 Bom 435: (6 Bom. L. R. 428) and in *Sagunappa Shankarappa v. Bhau Annaji*, F. A. No. 269 of 1918, D/-17-8-1920 by Macleod C. J. and Fawcett J., which was referred to in *Mallappa's case*, (39 Bom. L. R. 288: A. I. R. (24) 1937 Bom. 307). The present case is similar to *Bhimangonda v. Secretary of State*, F.A. No. 47 of 1910, decided by Scott C. J. and Batchelor J., (also referred to in *Mallappa's case*, (39 Bom. L. R. 288 : A. I. R. (24) 1937 Bom. 307) where a declaration was sought against both the Secretary of State for India and other defendants, but

possession of the lands in suit was sought against the latter only, and the Court said that "the suit was not on the face of it a claim against the Government." In *Mallappa v. Tukko*, (39 Bom. L. R. 288 : A. I. R. (24) 1937 Bom. 307), the plaintiff sought an order for delivery of possession of property against both the Secretary of State and the other defendant, and it was remarked (p. 295):

"Here the plaintiffs did not say in the plaint that they wanted an order for possession as against defendant 1 only, without seeking to bind the Secretary of State, and it is perfectly obvious that Government was made a party in order that their claim to possession of the lands might be enforced against Government. That being so, there was a claim against Government, namely, a claim for possession, which a civil Court could not entertain."

That is not, however, the position here: possession is sought against defendant 2 only. Therefore it seems to us that there is no bar under cl. (1) of sub-s. (a) of S. 4 of the Act.

[6] That being our conclusion the question arises what kind of order should be made in this case. The plaintiffs in the two suits based them on title and the first Court has held that they were owners by adverse possession. There is, however, no finding on this point by the lower appellate Court. These not being suits under S. 9, Specific Relief Act — in fact such a suit against Government is not maintainable—they must be sent back to the lower appellate Court, which ought to have recorded a finding on the question of the plaintiff's title. We accordingly set aside the decree of that Court and remand the case to it for disposal according to law. Costs will be costs in the proceedings of that Court.

D.H.

Suits remanded.

A. I. R. (36) 1949 Bombay 210 [C. N. 59.]

FULL BENCH

CHAGLA C. J., GAJENDRAGADKAR AND
TENDOLKAR JJ.

Nilkanth Ramchandra Chandole — Appellant v. Rasiklal Mulchand Gujar — Respondent.

Second Appeal No. 147 of 1948, Decided on 7th October 1948, from judgment of Chagla C. J. and Tendolkar J.

Bombay Rents, Hotel and Lodging House Rates (Control) Act (57 [LVII] of 1947), Ss. 12 and 50—Retrospective effect of Act is confined to what is expressly stated in S. 50 — Provisions of S. 12 not retrospective—Decree for ejectment under old Act — Appeal by defendant — Act coming in force during pendency of appeal—Defendant not entitled to take advantage of S. 12 (3): F. A. No. 365 of 1947 (Bom), **OVERRULED.**

Ordinarily, every legislation is prospective in its effect and it does not affect vested rights. But it is always competent to the Legislature to make any piece of legislation retrospective. But if the Legislature in-

tends to do so it must do so by a clear intention or by necessary implication. In order to decide whether the new statute is retrospective, and if so, to what extent, the Court must look at the relevant sections. [Para 2]

If the Legislature retrospectively affects pending proceedings, then it would be the duty of the Court of appeal to apply the law prevailing at the date of appeal which was pending before the Court. The mere passing of the decree does not preclude a Court of appeal from taking into consideration the change in the law effected after the passing of the decree. [Para 6]

A Court of law must always see to it as far as possible that the obvious intention of the Legislature is not defeated by a construction which it puts upon a statute passed by the Legislature. But, on the other hand, a Court of law should not put itself in the shoes of the Legislature. If the language of the statute is plain and clear then the intention of the Legislature can only be judged from the words and expressions it has used in the Act which it has passed. If there be any ambiguity and if more than one construction be possible, certainly the Court would lean in favour of that construction which gives effect to the Legislature's intention rather than that which leads to difficulties and anomalies. [Para 4]

The retrospective effect of the new Act is clearly confined to what is expressly stated in S. 50 of the Act. In terms the provisions of the new Act and the rules made thereunder are made to apply only to such suits and proceedings which are transferred under the provisions of S. 50. Section 12 is in terms prospective and not retrospective. Sub-section (2) clearly relates to suits which may be instituted after the Act has come into force. It cannot even by straining the language apply to suits which were already pending when the Act was put on the statute book, and sub-s. (3) which gives the right to the tenant to pay or tender the rent at the hearing of the suit only applies to those suits which may be instituted after the Act comes into operation. [Paras 2 and 3]

Hence, where a decree for ejectment is passed under the old Act and the new Act comes into force while the appeal of the defendant is pending the defendant is not entitled to take advantage of S. 12 (3) : F. A. No. 365 of 1947 (Bom), *OVERRULED*. [Para 3]

Appellant in person.

D. V. Patel — for Respondent.

Chagla C. J. — This second appeal arises from a suit filed by the plaintiff, a landlord, to eject the defendant, his tenant, who is the appellant before us. Both the lower Courts took the view that the defendant was in arrears of rent to the extent of five months and that therefore he was not ready and willing to pay the rent, and passed a decree for ejectment in favour of the plaintiff. In this second appeal, it has not been contended before us that the decree passed by the two lower Courts was not a proper decree. What has been contended before us is that in the events that have happened the decree can no longer stand and the same must be set aside.

[2] The decree of the trial Court was passed on 14th November 1946. Act LVII [57] of 1947 came into operation on 13th February 1948, and it is urged before us that the rights of the parties are to be determined by the provisions of that Act and not of the Act which was in force when the suit was filed and the decree passed in favour of

the plaintiff. Now, it is a well established canon of construction of every statute that ordinarily every legislation is prospective in its effect and it does not affect vested rights. But it is always competent to the Legislature to make any piece of legislation retrospective. But if the Legislature intends to do so it must do so by a clear intention or by necessary implication. In order to decide whether the new statute is retrospective, and if so, to what extent, we must look at the relevant sections. Now the most material section in this connection is S. 50 of the Act which repeals the earlier Bombay Rent Restriction Act, 1939, and the Bombay Rents, Hotel Rates and Lodging House Rates (Control) Act, 1944. Then the section goes on to provide that all suits and proceedings (other than execution proceedings and appeals between a landlord and a tenant) relating to the recovery or fixing of rent or possession of any premises to which the provisions of Part II apply and other suits and proceedings which are therein described and to which Part III applies, which are pending in any Court, shall be transferred to and continued before the Courts which would have jurisdiction to try such suits and proceedings under the Act. It may be noted that this new Act gives jurisdiction to certain Courts to try proceedings under this new piece of legislation. Then the section goes on to say that "thereupon all the provisions of this Act and the rules made thereunder shall apply to all such suits and proceedings." Therefore it is clear that in terms the provisions of the new Act and the rules made thereunder are made to apply only to such suits and proceedings which are transferred under the provisions of this section. There are two provisos to this section which provide that the orders passed or acts done by Controllers are deemed to have been passed or done under the provisions of the new Act and also all proceedings pending before the Controllers shall be transferred to and continued before the Controllers appointed under the new Act, as if they were proceedings instituted under the new Act before the Controllers. Therefore, the retrospective effect of this new Act is clearly confined to what is expressly stated in S. 50 of the Act. Apart from the question of Controllers with which we are not concerned, as far as suits and proceedings are concerned, the provisions of the new Act are made to apply only to those suits and proceedings which are transferred and it is also expressly provided that execution proceedings and appeals are not to be transferred. Then we turn to S. 12 of the Act which provides that a landlord shall not be entitled to recovery of possession of any premises as long as the tenant pays, or is ready and willing to pay, the amount of standard rent and permitted increa-

ses, if any, and observes and performs the other conditions of the tenancy in so far as they are consistent with the provisions of the Act. Then sub-cl. (2) and (3) give special concessions to the tenant which he did not have under the old Act. Sub-clause (2) provides that no suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent and permitted increases due until the expiration of one month next after a notice in writing of the demand of the standard rent and permitted increases has been served upon the tenant in the manner provided in S. 106, T. P. Act, 1882. Sub-section (3) precludes a Court from passing a decree for eviction even where a notice has been served under sub-s. (2) if the tenant pays or tenders in Court the said rent together with the costs of the suit. It is the provisions of this section that the appellant relies on and contends that if he pays or tenders in Court the arrears of rent a decree for eviction cannot be passed against him.

[3] In our opinion, this section is in terms prospective and not retrospective. Sub-section (2) clearly relates to suits which may be instituted after the Act has come into force. It cannot even by straining the language apply to suits which were already pending when the Act was put on the statute book, and sub-s. (3) which gives the right to the tenant to pay or tender the rent at the hearing of the suit only applies to those suits which may be instituted after the Act comes into operation because it in terms states "in such suit" and not "in any suit". "Such suit" can only be a suit referred to in sub-ss. (2) and (3) of S. 12.

[4] Attention may also be drawn to S. 7, **Bombay General Clauses Act** which deals with the effect of the repeal of a Bombay Act and it provides that unless a different intention appears, a repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed or affect any investigation, legal proceedings or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid. So that no pending legal proceedings can be affected by a repeal unless there is a different intention in the statute itself. Therefore, when we are asked to apply the new S. 12 to the decree which was passed by the trial Court, we must find in the new Act a clear intention which constitutes a departure from the principle of law laid down and enunciated in S. 7, General Clauses Act, and far from finding any such different intention, we find that under S. 50 of the new Act the Legislature has expressly and in terms made the

statute retrospective only in those restricted cases referred to in that section. It has been suggested that placing this narrow construction upon S. 50 would lead to anomalies and difficulties not contemplated by the Legislature. It is perfectly true that a Court of law must always see to it as far as possible that the obvious intention of the Legislature is not defeated by a construction which it puts upon a statute passed by the Legislature. But, on the other hand, it is equally clear that a Court of law should not put itself in the shoes of the Legislature. If the language of the statute is plain and clear then the intention of the Legislature can only be judged from the words and expressions it has used in the Act which it has passed. If there be any ambiguity, and if more than one construction be possible, certainly the Court would lean in favour of that construction which gives effect to the Legislature's intention rather than that which leads to difficulties and anomalies.

[5] It is pointed out that this construction results in this, that the pending proceedings, which are not transferred under S. 50, and which the Court before whom they are pending are competent to deal with, would not be governed by the provisions of the new Act. Therefore, this extra-ordinary result will follow that to the proceedings which are so transferred under S. 50, and are continued in the Courts which are given jurisdiction to try them under the new Act, provisions of the new Act will apply, but to the suits and proceedings which are not transferred, and which continue in the Courts which are competent to try them, provisions of the old Act will apply. We agree that it is indeed a curious and unexpected result and we are certain that the Legislature never intended that only proceedings which are transferred should be governed by the provisions of the new Act. It is obviously a case where the Legislature has failed to make its intention clear by using proper language. We also realise that serious injustice may result to the tenants whose cases are pending before different Courts in the District, who will not be able to get the benefit and advantages of this new legislation. We would, therefore, draw the attention of the Legislature to this anomaly that appears in the statute and we are certain that the Legislature will take the necessary steps to get right this omission which we are certain was never intended by it.

[6] There is a decision of a Division Bench (*Weston and Dixit JJ.*) which has taken the view contrary to the one we have formed of the correct view of the law. The view taken by that Bench was that the whole Act was intended to

be retrospective and that all pending litigation was intended to come within the ambit of the new Act. And inasmuch as an appeal is a continuation of a suit, the mere fact that a decree has been passed would not preclude a Court of Appeal from applying the provisions of the new statute to the appeal when it came before it, treating the appeal as the re-hearing of the suit, and passing a decree in accordance with the law as it applied to the parties at that date. With very great respect to these two learned Judges we entirely agree with the principles of law to which they have given expression. It is perfectly true that if the Legislature retrospectively affects pending proceedings, then it would be the duty of the Court of Appeal to apply the law prevailing at the date of appeal which was pending before the Court. It is also perfectly true that the mere passing of the decree does not preclude a Court of Appeal from taking into consideration the change in the law effected after the passing of the decree. But all these principles of law proceed on the assumption that the legislation which the Court is considering has been made retrospective by the Legislature. Before we apply these principles of law which are well settled and beyond dispute, we must first find in the legislation itself some provision which makes it retrospective, and we do not agree, with very great respect to the two learned Judges, that merely because S. 50 makes certain provisions retrospective, it is possible for the Court to draw an inference that the Legislature did not intend that only certain proceedings should be affected by the new legislation but that the intention was to make all pending proceedings irrespective of the provisions of S. 50 to come within the ambit of the new statute. In this particular case, reading ss. 50 and 12 together, if at all, a contrary intention appears to have been entertained by the Legislature. Weston J. also in a concurring judgment in that case felt great difficulty in construing S. 50. According to that learned Judge, it was impossible to hold that the applicability of the Act to a pending suit should depend upon an accident of a transfer under S. 50 being necessary. We agree with him that S. 50 has not been very happily drafted and that it does not clearly carry out the intention of the Legislature. But as I have already pointed out, it is not for the Court to speculate as to what the Legislature intended in order to make good any flaw or lacuna which may unfortunately appear in a piece of legislation. With very great respect therefore we are of the opinion that the case decided by Weston and Dixit JJ., *Surjitlal Ladhamal Chhabda v. Chandrasingh Manibhai*, First Appeal No. 365 of 1947 decided by Weston and Dixit JJ. on 1st April 1948 was not correctly

decided. We, therefore, hold that the new Act is retrospective only to the extent clearly provided in S. 50 of the Act. As this is the only point that survives in this second appeal and as we are of the opinion that the decree was rightly passed by both the lower Courts and that it is not open to us to take into consideration subsequent alterations in the law, the appeal must fail and is dismissed with costs.

[7] On the appellant agreeing to hand over quiet and peaceful possession of the premises in suit on or before 28th February 1949, and deposit in Court in the first week of each month the rent due the respondent agrees not to execute the decree until then.

D.H.

Appeal dismissed.

* **A. I. R. (36) 1949 Bombay 213 [C. N. 60.]**

CHAGLA C. J. AND GAJENDRAGADKAR J.

Muppanappa Kannappa Gastiyavar and another — Applicants v. Fakiragouda Chanasangouda Gangangoudar and another — Opponents.

Civil Revn. Appln. No. 598 of 1947, Decided on 26th July 1948, from order of Dist. Judge, Dharwar, in Misc. Appeal No. 33 of 1946.

* Civil P. C. (1908), O. 21, R. 89 — Application must be by judgment-debtor — Physical act of making deposit in Court may be by another on behalf of judgment-debtor — Auction sale in execution of decree — Mortgage of property by judgment-debtor — Amount kept with mortgagee for making deposit — Mortgagee making deposit — Joint application by judgment-debtor and mortgagee to set aside sale — Order 21, R. 89 held complied with — Deposit held was on behalf of judgment-debtor — Civil P. C. (1908), O. 3, R. 2.

It is true that as O. 21, R. 89 interferes with vested interests which have come into existence by the sale of the property, the rule must be strictly construed but what is required by the rule and what is mandatory is that the application must be made by the judgment-debtor. What is also required by the rule and what is also mandatory is that the deposit of the amount must be the deposit by and of the judgment-debtor. But the rule does not require that the judgment-debtor for instance cannot send his clerk with the money to the Court to make the deposit. It would be absurd to construe the rule to mean that the judgment-debtor himself must walk to the Court and with his own hands pay the amount to the proper officer of the Court. So long as the position is that the judgment-debtor is sending his own money for deposit and the deposit is being made by some one who does it under the directions of the judgment-debtor, the rule is satisfied. [Para 2]

After the property had been sold in execution, the judgment-debtor mortgaged the same. Out of the amount advanced a certain amount was kept with the mortgagee for making a deposit in the Court to set aside the auction sale. The mortgagee deposited the amount in the Court. A joint application to set aside the sale was made by the judgment-debtor and the mortgagee :

Held that O. 21, R. 89 was complied with and that the payment was on behalf of the judgment-debtor and

under his direction : A. I. R. (18) 1931 All. 449, *Dissent.*; A. I. R. (14) 1927 All. 561 and A. I. R. (32) 1945 Mad. 188, *Rel. on.* [Para 3]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 89, N. 16.

N. M. Hungund —for Applicants.

U. S. Hattayangadi for G. P. Murdeshwar

—for Opponents.

Chagla C. J. — The facts leading up to this civil revision application are that a money decree was passed against the judgment-debtor, applicant 1, and his judgment-creditor applied for the execution of that decree by attachment of certain lands belonging to the judgment-debtor. The execution proceedings were transferred to the Collector and the Collector sold the attached lands on 28th December 1944. This property was purchased at the auction sale by opponent No. 2. On 13th January 1945, the judgment-debtor mortgaged the property to applicant 2 and it was provided in the mortgage deed that applicant 2 should keep with himself a sum of Rs. 1,750 out of the mortgage amount which was advanced to the judgment-debtor for the purpose of depositing the amount in Court to set aside the auction sale which had taken place. On 15th January 1945, this sum of Rs. 1,750 was deposited in Court by the mortgagee. On 27th January 1945, a joint application was made by the mortgagee and the judgment-debtor to set aside the sale. The learned Judge before whom the application came rejected the application holding that the deposit was made by the mortgagee and not by the judgment-debtor and, therefore, he could not set aside the sale. The matter went in appeal and the lower appellate Court took the same view. Now the matter comes before us in civil revision application.

[2] The application to set aside the sale has been made by the judgment-debtor. The money that was deposited, viz., Rs. 1,750, belonged to the judgment-debtor and it was under the directions of the judgment-debtor that the amount was deposited by the mortgagee. It is true that the physical act of depositing the amount was performed by the mortgagee and not by the judgment-debtor, and Mr. Hattayangadi, on behalf of the opponents, contends that under O. 21, R. 89, not only the application has got to be made by the judgment-debtor to set aside the sale, but the deposit has to be made by the judgment-debtor in person. According to him the law requires that the deposit should be either by the judgment-debtor in person, or if he does not want to make the deposit, he must proceed under O. 3, R. 2, and must have a recognised agent for the purpose of performing that act. In our view, that is taking much too technical and also an erroneous view of the provisions of O. 21, R. 89. It is true that as O. 21, R. 89 interferes with vested interests

which have come into existence by the sale of the property, the rule must be strictly construed and what is required by the rule and what is mandatory is that the application must be made by the judgment-debtor. What is also required by the rule and what is also mandatory is that the deposit of the amount must be the deposit by and of the judgment-debtor. But the rule does not require that the judgment-debtor for instance cannot send his clerk with the money to the Court to make the deposit. It would be absurd to construe the rule to mean that the judgment-debtor himself must walk to the Court and with his own hands pay the amount to the proper officer of the Court. So long as we have the position that the judgment-debtor is sending his own money for deposit and the deposit is being made by some one who does it under the directions of the judgment-debtor, the rule is satisfied.

[3] Our attention has been drawn to a decision of the Allahabad High Court in *Syed Ibne Hasan v. Din Dayal*, A. I. R. (18) 1931 ALL. 449 : (132 I. O. 808). In that case Sen J. took the view that under O. 21, R. 89, the deposit must be made by the judgment-debtor in person, or by a recognised agent under O. 3, R. 2. With great respect to the learned Judge, we are unable to take the same view of the law and we might point out that the learned Judge had not before him an earlier decision and a decision of a Divisional Bench of his own Court which is reported in *Madhuri Saran v. Bishambher Nath*, 49 ALL. 839 : (A. I. R. (14) 1927 ALL. 561). In that case the judgment-debtors had mortgaged their property after the property had been sold in execution, and the judgment-debtors and the mortgagees, by means of separate applications, paid into Court the amount needed to get the sale set aside, one party tendering approximately two-thirds of the amount and the other one third; and Sir Cecil Walsh and Banerji JJ., held that there was nothing illegal in payment being made in that way and that the two payments should be treated as one and as being the payment of the judgment-debtors. Then there is a decision of the Madras High Court which has taken the same view as we are suggesting to be the correct view. The decision is reported in *Hanumayya v. Bapanayya*, I. L. R. (1945) Mad. 566 : (A. I. R. (32) 1945 Mad. 188) and the view that Sir Lionel Leach C. J. and Wadsworth J., took was that the personal attendance of the judgment-debtor was not necessary when paying the money. All that was necessary was that the deposit should be made on behalf of the judgment-debtor and under his directions. Both these conditions are satisfied here. The mortgagee has paid the amount on behalf of the judgment-debtor and under his directions.

[4] We, therefore, set aside the order of the executing Court and set aside the sale. Applicants to get the costs in this Court. No order as to costs in the Courts below.

[5] Rule in stay application made absolute. No order as to costs.

R.G.D.

Rule made absolute.

*A. I. R. (36) 1949 Bombay 215 [C. N. 61.]

DESAI J.

Raj Rani — Plaintiff v. Prem Adib—Defendant.

O. C. J. Suit No. 1510 of 1947, Decided on 21st July 1948.

* (a) Contract Act (1872), S. 2 (d) — Contract of service entered into by father on behalf of minor daughter is void being without consideration — Consideration moving from third party who is minor is no consideration — If father's promise be consideration for contract, then father can recover on account of breach, damages suffered by himself and not his daughter—In daughter's suit, she cannot recover more than her father can — Contract Act (1872), Ss. 10, 11, 25, 73.

Where the father of a minor daughter enters into a contract of service on her behalf with the defendant, the contract would be void for being without consideration. If the girl were major, instead of a minor, such a promise to serve would be good consideration within meaning of S. 2 (d) though the consideration moved from the third party. But under S. 11, the girl being a minor would not be competent to contract and her promise would not be enforceable against her. Consequently, her promise to serve would supply no consideration for the promise of the defendant to pay her a salary : A. I. R. (4) 1917 Mad. 630 (F. B.), *Rel. on.* [Para 15]

There being no contract enforceable at law, there is no breach of a contract, in respect of which the girl or her father can sue for damages. [Para 17]

If in such a case the only consideration for the contract is the promise of the father that his daughter shall serve the defendant, then the damages which the father can recover from the defendant in a suit filed by him against the defendant would be the damages sustained by the father himself. The daughter who is not bound by the agreement cannot obtain higher damages than what her father can himself recover in a suit filed by him, simply because she may be permitted by law to sue in her own name in respect of such a contract. In such a suit she cannot therefore recover damages sustained by herself on account of loss of salary : A. I. R. (4) 1917 Bom. 61 and A. I. R. (28) 1941 Bom. 129, *Rel. on.* [Para 19]

Annotation : — ('46-Man.) Contract Act, S. 2 (d) N. 3; S. 10 N. 5; S. 11 N. 4; S. 25 N. 1; S. 73 Ns. 4 and 13.

(b) Apprentices Act (1850), Preamble — Applicability — Act does not apply to contracts of personal service entered on behalf of minors — Such contracts do not stand on same footing as contract of apprentice or contract of marriage of minor : 21. Bom. 23 and A. I. R. (12) 1925 Bom. 97, *Ref.* — But in English law contracts of service and apprenticeship are put on same footing as contracts for necessities : (1913) 1 K. B. 520, *Ref.* — Under English law minor is liable if contract of service is for his benefit but not so under Indian law under which under S. 11, Contract Act, such contract is void : 30 Cal. 539 (P. C.), *Rel. on.* — The mere fact

that contract is for benefit of minor does not entitle minor to sue on contract: *Case law discussed*—Contract Act (1872), Ss. 11, 25, 73. [Paras 27, 32 and 33]

Annotation :—('46-Man.) Contract Act, S. 11 N. 2; S. 73 N. 13.

C. J. Shah — for Plaintiff.

N. A. Modh — for Defendant.

Judgment.—This suit raises a question of importance so far as contracts of service entered into on behalf of minors are concerned. Contracts involving service by minors may be of considerable value in cases like the one before me where the minor is allotted the role of a Cinema Star or is employed as an artist for the production of a film of considerable value.

[2] The plaintiff in this case is a minor girl who has brought this suit suing by her next friend, her father and natural guardian, one Dhiraj Singh Muramal, for the recovery of a sum of Rs. 8708-10-0 being the amount of damages alleged to have been suffered by her by reason of a breach of a contract entered into by Dhiraj Singh Muramal with the defendant for and on her behalf.

[3] Paragraph 1 of the plaint states as follows :

"On or about 15th January 1947, the defendant orally agreed with the *plaintiff's father* named Dhiraj Singh Muramal, to employ the plaintiff as an artist in the defendant's concern called the Prem Adib Pictures for a period of one year commencing from 15th January 1947 at the salary of Rs. 9500 to be paid in twelve equal monthly instalments. As the plaintiff was and is a minor, the said Dhiraj Singh Muramal entered into the said agreement on behalf of and for the benefit of the plaintiff It was *inter alia* agreed between the said Dhiraj Singh Muramal and the defendant that the plaintiff was to attend the defendant's office, shootings and rehearsals as and when required by the defendant. The terms of the said agreement were recorded in writing, a copy whereof is hereto annexed and marked 'A'."

[4] Exhibit 'A' to the plaint is a curious document as read in conjunction with the plaint. It reads as follows :

"Agreement drawn and signed on 15th January 1947, between Mr. Prem Adib the Proprietor of Prem Adib Pictures, Andheri, a film producing concern hereinafter called the producer of the one part and Miss Raj Rani residing at Dattatrey Bhuvan, Plot No. 176, Sir Bhal Chandra Road, Hindu Colony, Dadar, Bombay, hereinafter called the artist.

This is to confirm and put on record the following terms and conditions arrived at between us as per our personal talk and mutual agreement.

That the period of your contract will be from this day of agreement January 15, 1947, to January 14, 1948.

That you will be paid a lump sum amount of Rs. 9,500 (rupees nine thousand and five hundred only) for your full period of contract in twelve equal instalments.

That you will attend the office and the shooting and the rehearsals punctually as and when required.

That you will attend Gramophone disk and/or Track recording without any obligation to the Company; for that you will neither get nor demand any extra amount as royalty or remuneration, stipend or bonus apart from the above-mentioned amount fixed.

That all other terms and conditions shall be as are prevailing in agreements and contracts of like nature." At the end of the contract there appears a signature :

"For Prem Adib Pictures.
(Sd.) Prem Adib,
Proprietor."

Against that, the following words appear :

"I confirm and agree.

(Sd.) Raj Rani.
(Sd.) Dhiraj Singh."

[5] It is stated on behalf of the plaintiff that the oral agreement with the plaintiff's father was in the same terms as Ex. A and that as that agreement was not reduced to writing, the plaintiff's father is not precluded from giving evidence of the terms of that agreement merely because he has put his signature on Ex. A by way of attestation. This contention forms the subject-matter of issue No. 2, which was allowed by me at the request of the parties to stand over as it appeared to me that the plaintiff's contention was *prima facie* correct.

[6] The plaintiff proceeds to state that in pursuance of the agreement the plaintiff carried out her part of the contract, but the defendant in or about February 1947 engaged another artist for the role allotted to the plaintiff; that the defendant called upon the plaintiff to attend shooting and/or rehearsals, but when the plaintiff attended she was not given any work and was kept idle. The plaintiff states that in March, 1947, the defendant falsely alleged breaches of the agreement on the part of the plaintiff and wrongfully terminated the contract of service and refused to pay to the plaintiff or her father the salary due to her. The plaintiff states that the agreement was entered into by her father for and on behalf of the plaintiff and that the same was for her benefit and that she was ready and willing to perform her part of the agreement, but the defendant prevented the plaintiff from earning her salary during the remainder of the term whereby she suffered damages to the extent of Rs. 8,708-10-0. The damages are computed on the footing of the difference between Rs. 9,500, being the amount agreed to be paid to the plaintiff under the agreement dated 15th January 1947, and the sum of Rs. 791-5-4 which was the amount received by the plaintiff from the defendant.

[7] By his written statement, the defendant says that the parties to the agreement were the plaintiff and the defendant. The defendant states that he has no personal knowledge as to whether the plaintiff is or at the date of the agreement was a minor. He further says:

"As the plaintiff states that at the date of the said agreement the plaintiff was a minor the defendant submits that the said agreement is void in law and not enforceable and the plaintiff is not entitled to maintain

this suit in respect thereof. In the alternative and in the event of its being held that the agreement was arrived at between the defendant and the plaintiff's father Dhiraj Singh, the defendant will submit that the plaintiff being not a party to the agreement is not entitled to sue in respect thereof."

[8] By para. 2 of his written statement, the defendant submits that the terms of the agreement having admittedly been reduced to writing, no oral evidence is admissible of the terms thereof. Without prejudice to his aforesaid contention, the defendant denies that on or about 15th January 1947, or at any time there was any oral agreement arrived at between the defendant and the plaintiff's father Dhiraj Singh Muramal as alleged or otherwise on behalf of or for the benefit of the plaintiff. The defendant denies that the plaintiff was always ready or willing to perform her part of the agreement and says that the breach of the contract was committed by the plaintiff.

[9] The defendant has filed his counterclaim for the recovery of a sum of Rs. 5000 as damages sustained by the defendant by reason of the plaintiff's breach of the contract. In para. 10 of his written statement the defendant says that he will maintain his counterclaim only in the event of this Honourable Court holding that the agreement is valid and enforceable in spite of the fact that the plaintiff was a minor at the date of the counterclaim.

[10] On these pleadings the following issues were raised :

(1) Whether the defendant entered into an oral agreement with the plaintiff's father as alleged in para. 1 of the plaint ?

(2) Whether the terms of the oral agreement having been reduced to writing, any oral evidence is admissible as to the terms of the alleged oral agreement ?

(3) If the agreement was with the plaintiff's father, whether the plaintiff is entitled to maintain this suit ?

(4) Whether at the date of the agreement, the plaintiff was engaged by Messrs. Kanu Desai Productions ; and if so, whether the defendant knew and did not object to the same ?

(5) Who committed a breach of the said agreement ? and

(6) What is the amount, if any, payable by one party to the other ?

[11] At the hearing before me, the parties requested me to try issue 3 as a preliminary issue. That was on the footing and on the assumption that the defendant had entered into an oral agreement with the plaintiff's father as alleged in para. 1 of the plaint and that the plaintiff was then a minor. I agreed to try this issue as a preliminary issue in order to save the costs of the hearing of the other issues, which would mean a protracted hearing and which would compel me, in my judgment, to make remarks against the plaintiff or the defendant affecting their reputation in their profession, which I would like to avoid.

[12] It is stated in the plaint that the contract was entered into by the plaintiff's father, for and on behalf of the plaintiff. Now, under S. 183, Contract Act, a minor is not entitled to employ an agent. The contract, therefore, though it is made for and on behalf of the minor by a person who purported to act as his agent, is not the contract of the minor. In fact under S. 11, Contract Act, a minor cannot enter into a contract. Therefore, in order that there should be a contract, it must be a contract entered into with the guardian of the minor by the other party to the contract.

[13] Two questions, however, of considerable importance arise in such a case :

(1) What is the consideration for such a contract ? and (2) What is the measure of damages for breach of such a contract ?

[14] Section 2 (a), Contract Act provides as follows :

"When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

The words "to do" in S. 2 (a) include to my mind a proposal and an undertaking that someone else shall, at the request of the proposer, do something. Under S. 2 (b) a proposal, when accepted, becomes a promise. Under S. 2 (d) when, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise. Under S. 2 (e), every promise and every set of promises, forming the consideration for each other, is an agreement. Under S. 2 (f) promises which form the consideration or *part of the consideration* for each other are called reciprocal promises. Under S. 2 (g) an agreement not enforceable by law is said to be void. Under S. 25 an agreement made without consideration is void except in the cases mentioned in that paragraph.

[15] Bearing these elementary propositions in mind, what I have got to decide is : what was the consideration for the agreement, if any, arrived at between the plaintiff's father and the defendant? The promise of the father that the plaintiff would serve and the promise of the defendant that he would in that case pay the plaintiff her salary will be sufficient to constitute an agreement. But what was the consideration for which the defendant promised to pay the plaintiff her salary? In my opinion it was not the bare promise of the plaintiff's father that the plaintiff will serve the defendant in terms of the contract, and his liability to pay damages for breach of that undertaking which formed the consideration, but the real considera-

tion, or at least a part of the real consideration, was the promise of the plaintiff to serve in terms of the agreement between the plaintiff's father and the defendant. If the plaintiff instead of having been a minor had been a major, such promise to serve would form good consideration within the meaning of Section 2 (d), Contract Act, though the consideration moved from a third party. Under S. 11, the plaintiff was not competent to enter into a contract and, therefore, her promise would not be enforceable against her. In my opinion, therefore, the plaintiff's promise to serve supplies no consideration and the contract was therefore void.

[16] I came to the above conclusion on a bare reading of the relevant sections. But I find on going through the authorities that my view is fortified by the expression of the opinion of the learned Judges reported in *Raghava Chariar v. Srinivasa Raghava Chariar*, 40 Mad. 308; (A. I. R. (4) 1917 Mad. 630 F.B.). Srinivasa Ayyangar J. at p. 323 says :

"It is no doubt true that if the infant is incapable by reason of tender age of assenting to a proposal, there can in fact be no contract at all. As pointed out in *Parsons on Contract*, Volume I, page 340, 'an infant, using the word in its common meaning, that of a child who had not left its mother's arms, cannot make a contract in fact.' The question then, whether a minor who has assented to a proposal and has therefore become a promisee, is entitled to enforce the promise, depends upon the question whether the promise is supported by consideration. This rule would equally apply to mutual promises."

At p. 324 his Lordship says :

"Where the consideration for the promise of the adult is a promise by the minor, inasmuch as the minor cannot make a promise enforceable in law, the consideration necessarily fails and the promise of the adult does not therefore become a contract; as a learned writer says : 'The promise of infants should never have been held to be promises in law or to constitute a consideration for another promise'."

[17] In my opinion there being absence of the consideration contemplated by the parties, there was no contract between the plaintiff's father and the defendant which was enforceable at law, and there is no breach of a contract in respect of which the plaintiff's father or the plaintiff can sue for damages. I have set out above the paragraphs of the plaint and the terms of the contract annexed to the plaint which show clearly to my mind that the entire consideration for the agreement was the plaintiff's promise to serve. But in fact the plaintiff's promise did not constitute any consideration in law and therefore there was in law no contract.

[18] Assuming that the bare promise and undertaking of the plaintiff's father to the defendant formed a consideration for the defendant's promise to pay the plaintiff her salary, what would be the measure of damages in such a

case? This question was considered by Kemp J. in a case reported in *Abdul Razak v. Mahomed Hussen*, 19 Bom. L. R. 164 : (A. I. R. (4) 1917 Bom. 61). In that case the plaintiff, Abdul Razak sued the defendant Mahomed Hussen for breach of an agreement whereby the defendant agreed to give his daughter in marriage to the plaintiff. Kemp J. held that in suits of this nature between Mahomedans the plaintiff cannot recover the damages peculiar to an action for breach of promise of marriage under the English law. This case is referred to by Beaumont C. J. in his judgment in *Khimji Kuverji v. Lalji Karamsi*, 43 Bom. L. R. 35 at p. 38 : (A. I. R. (28) 1941 Bom. 129). The relevant passage is at p. 45, where Beaumont C. J. says as follows :

"In *Abdul Razak v. Mahomed Hussen*, (19 Bom. L. R. 164 : A. I. R. (4) 1917 Bom. 61) a Muslim father of the bridegroom sued the father of the bride for damages for breach of his contract to give his daughter in marriage. That was a case of a contract between the two parents, and Kemp J. decreed the suit but held that the measure of damage must be based on the damage suffered by the plaintiff's father, and not on the damage suffered by the prospective bridegroom in the loss of a wife ; and if such a suit lies, I agree with the view of Kemp J. as to the measure of damage."

It seems that Beaumont C. J. was in error in thinking that in *Abdul Razak v. Mohamed Hussen* : (19 Bom. L. R. 164 : AIR (4) 1917 Bom 61) the plaintiff was the father of the bridegroom and that the contract was between the respective parents of the prospective bridegroom and the bride. The plaintiff in fact was the bridegroom himself, but I respectfully agree with the view of Beaumont C. J.

[19] In my opinion if, the only consideration for the contract was the promise of the plaintiff's father that the plaintiff shall serve the defendant, then the damages which the plaintiff's father could have recovered from the defendant, in a suit filed by him against the defendant would be the damages sustained by the plaintiff's father himself. I do not see any principle of law under which the plaintiff, who is not bound by the agreement, can obtain higher damages than what the plaintiff's father could himself have recovered had he chosen to file the suit, simply because the plaintiff may be permitted by law to sue in her own name in respect of such a contract. It is clear on looking at the particulars of damages that what the plaintiff seeks to recover is damages sustained by herself and not by her father. Those damages, in my opinion, the plaintiff cannot recover.

[20] I shall now consider whether there is any provision in any of the text books or any of the Indian statutes or whether there are any judgments of the Courts in India which should lead me to hold that contracts of service entered into by or on behalf of minors are valid and binding.

Trevelyan on Minors, 6th Edn, at p. 20, says this :

"A minor can recover for work and labour done by him, and for money paid by him, and money had and received for his use. He can also recover compensation for a non gratuitous act done by him from the person enjoying the benefit of such act (see section 70, Indian Contract Act) as for instance he can recover wages or payment for piece-work, or work as a servant (see section 32 of the Presidency Small Cause Courts Act, XV of 1882 —

A minor may enter into a contract of apprenticeship but he cannot be sued thereon [See Pollard v. Rouse, 33 Mad. 288 : (6 I C 754)]"

[21] The Apprentices Act (XIX [19] of 1850) is the only Act, so far as I can see, which provides for contracts in the nature of contracts of service which are binding on minors. That Act was passed, as the preamble to that Act shows

"for better enabling children, and especially orphans and poor children brought up by public charity, to learn trades, crafts and employments, by which, when they come to full age, they may gain a livelihood". It contains special provisions which I need not set out herein at length. Under S. 1 of that Act any child, above the age of ten, and under the age of eighteen years, may be bound apprentice by his or her father or guardian to learn any fit trade, craft or employment, for such term as is set forth in the contract of apprenticeship, not exceeding seven years, so that it be not prolonged beyond the time when such child shall be of the full age of twenty-one years, or in the case of a female, beyond the time of her marriage. By S. 8 of the Act, it is provided that every contract of apprenticeship shall be in writing, according to the form given in the schedule A annexed to this Act, or to the like effect, etc. Section 9 requires that every such contract shall be signed by the person to whom the apprentice is bound, and by the person by whom he is bound and by the apprentice, when he is of the age of fourteen years or more at the time of binding. The form of the agreement annexed to schedule A to the Act is as follows:

"This agreement made the—between A. B., of—and C. D., of—witnesseth that the said A. B., doth this day bind E. F., a boy (or girl) of the age of—years completed, son (or daughter) of the said A. B. to dwell with and serve the said C. D., as an apprentice,—during all which term the said apprentice shall duly and faithfully serve the said C. D.,—and the said C. D., in consideration of the premium or sum of—paid by the said A. B., to the said C. D., and of faithful service of the said E. F., doth covenant and agree with the said A. B. that he will teach or cause to be taught to the said E. F., in the best way and manner that he can, the trade of a—during the said term : and will also, during the said term, find and allow unto the said apprentice good, wholesome and sufficient food, clothes, lodging, washing, and all other things necessary, fit and reasonable for an apprentice : and further, (here insert any special covenants)."

Section 10 of the Act provides that no such contract shall be valid unless it be executed in the manner aforesaid.

[22] The form of the agreement clearly shows that though the agreement may be signed by the apprentice as required by the Act, the agreement is entered into between the employer and the father or other relation of the minor who contracts on behalf of the minor that the minor shall serve the employer. In view of this, it is difficult to understand why Trevelyan says that a minor may enter into a contract of apprenticeship.

[24] In the Fourth Schedule to the Civil Procedure Code (Act XIV [14] of 1882) there is a Form annexed as Form No. 65. (This Form is not reproduced in the Schedule to the Civil Procedure Code, Act (V [5] of 1908). It is the Form of a plaint where the apprentice sues the employer. That Form states as follows :

"That on the . . . day of . . . at . . . the defendant entered into an agreement with the plaintiff and his father E. F. and that the plaintiff entered into the service of the defendant with him after the manner of an apprentice, etc."

Here again it is difficult to see why the agreement is said to be with the plaintiff. The question whether a minor can bring a suit in respect of a contract of apprenticeship or of service entered into on his behalf by his father or guardian is not free from difficulty, and I propose to consider that question later on. To my mind, the provisions of the Apprentices Act must be strictly limited to the cases therein provided. So far as this suit is concerned, suffice it to say that the contract in suit is not a contract of apprenticeship.

[25] In English law contracts of service and apprenticeship are put on the same footing and are put in the same category as contracts for necessities. In *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas*, 21 Bom. 23, Candy J. at page 33 says :

"A contract of a father to give his daughter in marriage is analogous to the contract of a father apprenticing his son and binding himself for the performance by his son of all and every covenant on his part."

At the proper time, I shall consider whether the contract of marriage is analogous to and stands on the same footing as the contract of apprenticeship in every respect.

[26] In *Fernandez v. Gonsalves*, 26 Bom. L. R. 1035 : (A. I. R. (12) 1925 Bom. 97), Taraporewala J. after referring to the above observations of Candy J. in *Purshotamdas Tribhovandas v. Purshotamdas Mangaldas* : (21 Bom. 23), says as follows at p. 1045 :

"The question there considered was not the liability of the minor but of the father. But what I am concerned with here is the well recognized principle that the father can enter into a binding contract for the benefit of his minor child which contract is enforceable at law. A contract of apprenticeship is held to be good because it is considered to be for the benefit of the minor; in the same way a contract of marriage is for

the benefit of the minor, and I see no reason why a father should not be held to have power to make a contract of marriage on behalf of his minor child. I have not been able to find in the English reports a single case where the father has entered into a contract of marriage on behalf of his minor child. However, to my mind in India the Court would be justified in applying the principles of contracts of apprenticeship in England in so far as to hold that the contract of marriage in India stands on the same footing as being one for the benefit of the minor and being one which the father can enter into on behalf of the minor. Neither a contract of personal service nor a contract of marriage can be ordered to be specifically performed so that in either case the apprentice or the girl cannot be compelled to carry out his or her part of a contract against his or her wishes. However, if it is an enforceable contract, the other result, namely, the liability in damages of the party making the breach of the contract, would follow."

[27] Both these judgments fail to notice that in India a contract of apprenticeship is valid because of the express provisions of the Apprentices Act (XIX [19] of 1850) and only as provided for by that Act. In view of those observations, however, I have carefully considered whether the contract of service stands on the same footing as a contract of apprenticeship or a contract of marriage of a minor. For the reasons I have set out in this judgment I am constrained to hold that the contract of personal service does not stand on the same footing as the contract of apprenticeship or a contract of marriage of a minor.

[28] I have not come across any case decided in any of the High Courts in India where the legal position in reference to the contract of service concerning a minor was decided or considered, and I have therefore to decide this case on the sections of the Indian Contract Act only, cited above.

[29] I have hitherto carefully avoided considering the position in English law as regards contracts of infants. But I think it is necessary, in spite of the vital difference in English law and Indian law on this point, briefly to set out the position in English law.

[30] Simpson on the Law of Infants, 4th Edn., at p. 7, says:

"The acts of an infant fall under three heads, according as they are (1) void, (2) voidable, or (3) binding."

Section 1, Infants Relief Act, 1874, makes void many contracts by infants which were formerly voidable only. It is in the following words:

"All contracts, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants, shall be absolutely void."

[31] Halsbury in Vol. XVII, p. 604, Para. 1301, states as follows:

"At common law, an infant's contracts are, in general, voidable at the instance of the infant, though binding upon the other party. Exceptions to this rule are contracts for necessities, and certain other contracts

such as contracts of service and apprenticeship, if they are clearly for the infant's benefit; such contracts are good and binding upon an infant. Contracts which are obviously prejudicial to an infant are wholly void."

[32] In English law contracts of service and apprenticeship are put on the same footing as contracts for necessities. In *Coke upon Littleton*, 172A, the note as to the power of an infant to bind himself by a writing states that there are some exceptions to his general inability, as:

"An infant may bind himself to pay for his necessary meat, drink, apparel, necessary physic, and such other necessities, and likewise for his good teaching or instructions, whereby he may profit himself afterwards."

If, therefore, there is a contract of service or apprenticeship, which is for the benefit of the infant, it would, according to English law, be enforced against the infant whether the contract was entered into by the infant or on behalf of the infant. A notable instance of the enforcement of such a contract against the infant is to be found in the case of *Roberts v. Gray*, (1913) 1 K.B. 520 : (82 L.J.K. B. 362). In that case Cozens-Hardy, Master of the Rolls, says that the doctrine of an infant's contract for necessities being binding was applied not merely to bread and cheese and clothes, but to education and instruction. In that case of *Roberts v. Gray*, (1913) 1 K. B. 520 : (82 L. J. K. B. 362), John Roberts who became well known for his reputation as a great billiard player entered into an agreement with Joseph Gray and Harry Gray, the father of Joseph Gray, that Joseph Gray should accompany John Roberts on a tour of the world as professional billiardists. It was held by the Court of Appeal that the education which a billiard player of the receptive capacity of Joseph Gray would get from playing continually month after month with John Roberts was so valuable that it amounted to necessities in the sense of a labour and education contract. It was held in terms that the contract was for necessities. In that case £1500 damages was awarded against the defendants. Joseph Gray appealed against the judgment of the Lord Chief Justice who awarded those damages against him in the first instance, but the Court of Appeal dismissed the appeal.

[33] Now though according to English law the minor would be liable in the case of a contract of service where the contract was for his benefit, it is clear that under s. 11, Contract Act the minor's contract being void, the minor would not be held liable: see *Mohori Bibee v. Dhurmodas Ghose*, 30 I. A. 114 : (30 Cal. 539 P. C.).

[34] The contract of apprenticeship entered into by the guardian is protected by the Apprentices Act (XIX [19] of 1850) provided the case falls within the terms of that Act, but no such exception is made in the case of contracts of service. I realize that as a result of this judg-

ment minors may lose the benefit of contracts of service which have been considered so beneficial to them as to be put in the category of necessities. I am, however, not concerned with the policy of the Legislature under which all contracts of minors were made void and therefore unenforceable by or against the minor.

[35] Section 68, Contract Act, which falls under the chapter dealing with certain relations resembling those created by a contract, says that if a person incapable of entering into a contract is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. Apart from that, the minor is not personally liable though his property may be made liable where the contract is made by his guardian who has the authority to bind his property. It is held that the minor is not liable under s. 70, Contract Act, for breach of an implied contract: see *Bankey Behari Prasad v. Mahendra Prasad*, 19 Pat. 739 : (A. I. R. (27) 1940 Pat. 324 F.B.).

[36] As the minor's contract is a void contract, he is not entitled to sue for damages for breach of such contract including the contract of service where the contract was entered into by the minor himself. The rights which a minor may gain under s. 70, Contract Act, are rights which, strictly speaking, do not arise by virtue of the contract made by the minor but by reason of the relationship resembling those created by a contract. It has been held in certain cases that where the minor has already given the full consideration to be supplied by him, he is entitled to enforce the contract: see *Hanmant Lakshman v. Jayarao Narinha*, 13 Bom. 50; *Raghava Chariar v. Srinivasa Raghava Chariar*, 40 Mad. 308 : (A. I. R. (4) 1917 Mad. 630 F. B.) and *Abdul Ghaffar v. Piare Lal Salig Ram*, 16 Lah. 1 : (A. I. R. (21) 1934 Lah. 480). I am not concerned with those cases because the contract that I am considering is an executory contract where the consideration is still to be supplied and has not already been supplied as in those cases by the minor.

[37] If then a minor cannot sue on a contract of service entered into by him personally, is he entitled to sue for obtaining practically the same relief, simply because the contract has been entered into for and on his behalf and for his benefit by his guardian? I have already referred to the fact that a minor cannot employ an agent, and, therefore, it cannot be said that the contract was entered into "for and on his behalf" in that sense. The expression "for his benefit" is easily understood when one is speaking of a minor's contract according to English law, for there the

contract is held binding on the minor, if it is for the benefit of the minor. But according to Indian law the contract is not binding on the minor, and, therefore, on the ground of want of mutuality, one should hesitate considerably before such a contract is held binding on the other side. I am prepared to concede that such contracts of service may be "for the benefit of the minor." But are they therefore binding on the other party? Or is the minor entitled to sue in respect of such contracts? This brings me to a consideration of the cases in which a third party has been held entitled to sue in his own name in respect of a contract made by two parties under which contract the third party gets a benefit, or which contract is made "for his benefit."

[38] I shall first consider the question of the third party's right to sue on such a contract on first principles. When a contract is arrived at between A and B, what induces A to enter into the contract with B is not only the advantage which A will derive but also the fact that B is a reasonable man and that he is a man of financial stability and a respectable man. It does seem to be hard on A that when he binds himself by his promise to B only, he should be held liable to C also in a case where a benefit under the contract is reserved for C, with the consequence that he would be liable to two actions in respect of the same promise. It is a matter of common experience that the next friend of a minor or a lunatic bringing a suit is not always reasonable in the conduct of the suit. The case becomes a case of greater hardship if C is not a lunatic but is inclined to behave like a lunatic. It would therefore seem unfair to impose a contractual liability on A towards C which liability he had not undertaken to discharge at the instance of C. Under the abovementioned agreement B had only conferred an authority upon A to pay the money to C, but that authority may be revoked by B at any moment. It may be that left to himself B may not have sued A. Why should then C be entitled to sue A merely because of a benefit provided for by B in his contract with A? Is he entitled to do so even against the wish of B or where there is no evidence that B has authorized C to sue A? In the case where a trust is created by B and A has accepted that trust and A has accepted the position of a trustee towards C, C acquires a right of property in himself and he would therefore be entitled to sue A irrespective of the consent of B or even against the wish of B. Apart from such a case and the other cases which form an exception to the general rule, it is B only who can sue A.

[39] I shall next turn to the Indian Contract Act. The definition of "promisor" and "promisee" rigidly excludes the idea that the contract can

be enforced by a person who is not a party to the contract, and there is nothing in S. 2 to encourage such an idea. It was so stated by Rankin C. J. in *Krishna Lal Sadhu v. Pramila Bala Dasi*, 55 Cal. 1315 at p. 1326 : (A. I. R. (15) 1928 Cal. 518).

[40] In *Mir Sarwarjan v. Fakhruddin Mahomed Chowdhuri*, 39 I. A. 1 : (39 Cal. 232 P.C.), the suit was brought by three plaintiffs (of whom the first was an infant by his next friend and duly appointed guardian) alleging that they were respectively the owners by right of inheritance of the property claimed in the plaint; that the defendant had agreed to sell them the property at a price; and they prayed for specific performance of the agreement. The Subordinate Judge passed a decree as prayed and the High Court affirmed it. This decision was reversed by the Privy Council. In that case one Mr. Garth was at the time of the purchase the manager of the estate of respondent 1 who was then a minor, and he entered into the contract with the appellant, (Mir Sarwarjan), as such manager. It was assumed before the Privy Council that the contract was not intended to bind the manager personally and that it was intended to bind the minor or the minor's estate. It was also assumed that the purchase was an advantageous purchase for the minor. Lord Macnaghten in his judgment at p. 6 says as follows :

"It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or minor's estate by a contract for the purchase of moveable property, and they are further of opinion that as the minor in the present case was not bound by the contract there was no mutuality, and that the minor who has now reached his majority cannot obtain specific performance of the contract."

It would, therefore, seem that the mere fact that the contract is for the benefit of the minor does not entitle the minor to sue on the contract. The minor would have been entitled to specific performance of the contract if he had been a major instead of a minor; but being a minor, he could not sue as there was no mutuality in the contract.

[41] In the case of *Jamna Das v. Ram Autar Pande*, 39 I. A. 7 : (34 ALL. 63 P.C.), the action was brought by a mortgagee to enforce against a purchaser of the mortgaged property an undertaking that he entered into with his vendor. It was held that the mortgagee had no right to avail himself of that as he was no party to the sale. The purchaser had entered into no contract with him and was not personally bound to pay this mortgage debt. It was held that he was not a person from whom, in the words of S. 90, T. P. Act, "the balance is legally recoverable."

[42] In *Dunlop Pneumatic Tyre Company, Limited v. Selfridge and Company Ltd.*, 1915 A. C. 847 : (84 L. J. K. B. 1680), Lord Haldane says at p. 853 :

"My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract. Such a right may be conferred by way of property, as, for example, under a trust, but it cannot be conferred on a stranger to a contract as a right to enforce the contract *in personam*."

[43] In *In re Rotherham Alum and Chemical Company*, (1883) 25 Ch. D. 103 : (53 L. J. Ch. 290), Lindley L. J. says as follows at p. 111 :

"But an agreement between A and B that B shall pay C, gives C no right of action against B. I cannot see that there is in such a case any difference between Equity and Common Law, it is a mere question of contract. It is said that Mr. Peace has an equity against the company because the company has had the benefit of his labour. What does that mean? If I order a coat and receive it, I get the benefit of the labour of the cloth manufacturer; but does any one dream that I am under any liability to him? It is a mere fallacy to say that because a person gets the benefit of work done for somebody else he is liable to pay the person who did the work."

[44] In *National Petroleum Company Limited v. Popatlal*, 38 Bom. L. R. 610 : (A. I. R. (23) 1936 Bom. 344), it was held that where A and B enter into a contract under which A agrees to indemnify B against all his debts, a creditor of B cannot sue A on the contract.

"A person who is not a party to a contract is not entitled to maintain an action upon that contract. This rule is subject to well-recognised exceptions, e. g., a person who is not a party to a contract can sue on it if he is claiming through a party to the contract or if he is in the position of a *cestui que trust* or of a principal suing through an agent, or if he claims under a family settlement.

The fact that consideration may move from a third party does not involve the proposition that a third party can sue upon a contract."

[45] In *Great American Insurance Company v. Madanlal Sonulal*, 37 Bom. L. R. 461 : (A. I. R. (22) 1935 Bom. 353), the head-note reads as follows:

"The plaintiff was a minor and the sole surviving coparcener of a joint Hindu family. The business of the family was carried on by the plaintiff's sister's husband, who acted as his guardian. The guardian effected an insurance against fire with the defendant company on cotton bales belonging to the plaintiff in the plaintiff's name. Some of the bales having been destroyed by fire, the plaintiff sued by his guardian as his next friend to recover the amount of loss caused by fire from the defendant company. An issue was raised whether the contract of insurance was void on the ground of plaintiff's minority. It was held:

(1) that the contract sued upon was not a contract which was made by a minor although it was made on behalf of the minor by a person who acted as his guardian; (2) that the plaintiff-minor having been a person for whose benefit the contract was made, was entitled to sue on the contract; (3) that, therefore, the defendant company had no defence to the suit."

This case has been subjected to the following criticism in Mulla's Contract Act, p. 64:

"The principle on which this decision is based is not altogether easy to understand. If the guardian contracts as the minor's agent, it is the minor's contract and therefore a nullity. If it is the guardian's contract, he should alone be entitled to sue, though he may be under an obligation to hold any benefit under the contract for the minor's benefit."

I must point out that in that case *Great American Insurance Company v. Madanlal*, 37 Bom. L. R. 461 : (A. I. R. (22) 1935 Bom. 353) the guardian had taken out the policy of insurance in the name of Surajmal Sonulal, which was the name in which the joint Hindu family of which the minor was the sole surviving coparcener was carrying on business in cotton and other commodities. The guardian, therefore, was acting in the position of a trustee and the plaintiff was occupying the position of a *cestui que trust*. The defendant company knew that the business was carried on by the minor and by reason of the fact that they issued the policy in the name of Surajmal Sonulal, they undertook an obligation not only towards but to the minor for the payment of the loss. The contract was not one which the guardian could set aside at his will. He could not hold the moneys received from the insurance company for his own benefit or make it payable to someone else. The guardian had the authority to insure the property and to recover from the property of the minor the premium, if paid by him, though, as Beaumont C. J. points out, the premium was presumably paid from the minor's property. The insurance company could recover the premium if unpaid from the minor's property. It was therefore the minor who supplied the consideration for the insurance company's promise to pay the amount of the loss to him. As the guardian was in the position of a trustee acting for the minor, the moneys recovered by the guardian would be held by him as trust moneys and not as his own property which would devolve on the Official Assignee on his insolvency. On the face of the policy the insurance money was payable to the minor. The substantive right to sue was in the minor. The omission to join the guardian as a party to the suit did not make any difference as the insurance company on payment to the minor of the loss pursuant to the decree of the Court would obtain a complete discharge of their liability under the policy.

[46] In *Les Affreteurs Reunis Societe Anonyme v. Leopold Walford (London) Limited*, 1919 A. C. 801 : (88 L. J. K. B. 86), the facts were these: "It is usual for a charter-party to provide that a commission shall be payable to the broker by whom the charter is negotiated. The broker is not a party to the charter-party.

and it is the practice for the charterer, if necessary, to sue the shipowner for the amount of the broker's commission *as trustee for the broker*." In that case the action had been brought by the broker himself, but by consent it was treated as brought by the charterers as trustees for him. The House of Lords recognized the practice and gave judgment in his favour. At p. 806 Lord Chancellor Birkenhead says :

"My Lords, so far as I am aware, that case (*Robertson v. Wait*, (1873) 8 Ex. 299 : (22 L. J. Ex. 209), has not before engaged the attention of this House, and I think it right to say plainly that I agree with that decision and I agree with the reasoning, shortly as it is expressed, upon which the decision was founded. In this connection I would refer to the well-known case of *In re Empress Engineering Company*, (1881) 16 Ch. D. 125 at p. 129 : (29 W. R. 342). In the judgment of Sir George Jessel, M. R., the principle is examined which, in my view, underlies and is the explanation of the decision in *Robertson v. Wait*, ((1873) 8 Ex. 299 : (22 L. J. Ex. 209). The Master of the Rolls uses this language : 'So, again, it is quite possible that one of the parties to the agreement may be the nominee or trustee of the third person. As James L. J. suggested to me in the course of the argument, a married woman may nominate somebody to contract on her behalf, but then the person makes the contract really as trustee for somebody else, and it is because he contracts in that character that the *cestui que trust* can take the benefit of the contract'."

[47] I am bound by the decision of the Appeal Court in *Great American Insurance Company v. Madanlal Sonulal*, 37 Bom. L. R. 461 : (A. I. R. (22) 1935 Bom. 353), but I am also of the opinion that that case was rightly decided. Even if the contract in that case had been entered into by the minor himself and he had already paid the premium, the minor would have been entitled to recover the loss on the authority of the cases already referred to by me. The head-note in that case *Great American Company's case* : (37 Bom. L. R. 461 : A. I. R. (22) 1935 Bom. 353), says "that the plaintiff-minor having been a person for whose benefit the contract was made, was entitled to sue on the contract." I am, however, not inclined to read that observation, for the reasons hereinafter set out, as laying down that in every case where a contract is made for the benefit of the plaintiff-minor the minor would be entitled to sue on the contract.

[48] It was at one time thought that if the person who was to take a benefit under the contract was nearly related by blood to the promisee a right of action would vest in him. The case of *Tweddle v. Atkinson* (1861) 1 B. & S. 393, is conclusive against this view.

[49] In *Shankar Vishvanath v. Umabai*, 37 Bom. 471 : (19 I. C. 736), it was held that though the insurance policy was a contract between the deceased and the insurance company expressed to be for the benefit of the wife of the assured, it was within the power of the assured at any

time to put an end to the contract by ceasing to pay the premia or otherwise to defeat the expectation of his wife by assigning the policy to a creditor. He could divest himself of his beneficial interest in the policy only by an assignment in writing or by a signed declaration of trust. It was held that there was nothing in the Contract Act to show an intention that a person not a party to the contract can sue on it. At p. 479 Scott C. J. said :

"There is, however, nothing in the present case to show that the plaintiff was either the promisor or the promisee and therefore a party to the agreement. There is nothing in the Act to show an intention that a person not a party to the contract can sue on it. So far as it goes, S. 2 (i) is an indication to the contrary."

This case was followed in *Krishna Lal Sadhu v. Pramila Bala Dasi*, 55 Cal. 1315 : (A. I. R. (15) 1928 Cal. 518).

[50] In *Adhar Chandra Mandal v. Dal Gobinda Das*, 63 Cal. 1172 : (A. I. R. (23) 1936 Cal. 663), it was held that a stranger to a contract cannot take the benefit of the contract between two other persons reserving a benefit to him, unless from the terms of the contract it is clear that a trust for him is intended—see also *Jnan Chandra Mukherji v. Mano Ranjan Mitra*, I. L. R. (1941) 2 Cal. 576 : (A. I. R. (29) 1942 Cal. 251) and *Subbu Chetti v. Arunachalam Chettiar*, 53 Mad. 270 : (A. I. R. (17) 1930 Mad. 382 F. B.).

[51] In principle I do not see any distinction whether the benefit reserved under the contract is the benefit reserved for a minor, or for a married woman, or for any other person. In law a trust in favour of such third party does not arise merely because a benefit is provided for him or her. Therefore, in my opinion, a contract made by the father of a minor including a contract of apprenticeship or service is not a contract which the minor is entitled to sue on, on the ground that it is for his benefit, where the contract is executory and the full consideration payable by or on behalf of the minor is not paid. The work that the minor in the case before me did for a month or two was of no use to the defendant who promised to pay to the plaintiff Rs. 9,500, only if she completed the picture.

[52] This brings me to a consideration of contracts of marriage of minors entered into by the father or guardian of the minor. I am of the opinion that contracts for marriage stand in a class by themselves. Rankin C. J. in the case above cited *Krishna Lal Sadhu v. Pramila Bala Dasi* : (55 Cal. 1315 : A. I. R. (15) 1928 Cal. 518) says at p. 1327 :

"I say nothing as to whether special rules of law may be applicable to communities among whom marriages are contracted for minors by parents and guardians. But putting aside such cases, I see no reason to think that the law in India contains a series

of exceptions to the principles that a contract can only be sued upon as such by a party thereto."

[53] In *Fernandez v. Gonsalves*, 26 Bom L R 1035: (A. I. R. (12) 1925 Bom. 97), Taraporewala J. was considering the question of a contract of marriage entered into by the plaintiff's father with the defendant. The parties in that case were Native Christians or Goans. Taraporewala J. referring to the case of *Mohori Bibi v. Dhurmodas Ghose*, 30 I. A. 114: (30 Cal. 539 P. C.) says this at p. 1038:

"Whether their Lordships of the Privy Council would have applied the same principle to a contract of marriage is to my mind very doubtful; and, so far as I am concerned, unless there is an authority on the point which is absolutely binding on me, I am not prepared to hold that the contract of marriage made on behalf of a minor by a person, who is natural guardian of the minor and who is the only person who could enter into such a contract, is void. The principle on which I hold the contract in this case valid is the principle which has been laid down subsequent to the Privy Council decision in cases where the Courts in India have tried to give the force of contract to agreement made by the guardian of a minor for his behalf, where the guardian has power to enter into such agreement so as to bind the minor and the agreement is for the minor's benefit."

At p. 1040 Taraporewala J. says:

"It is considered in this country a sacred and essential duty of the parents and guardians, particularly of girls, to see that they are settled down in life by proper marriage. (The plaintiff in that case was a girl.) . . . I consider these Indian Christians and Goans, so far as the duty of making contract of marriage is concerned, on the same footing as Hindus or Mahomedans and other communities in India, and on that footing I come to the conclusion that it is the duty of the parents to make a contract of marriage for their daughters, and that, therefore, they can make a binding contract on behalf of their daughters."

At p. 1042 he says:

"The principle which the Court has to consider is this: *has the guardian power to enter into the contract on behalf of the minor so as to bind the minor, and, secondly, whether the contract is for the benefit of the minor. If either of the two essentials is wanting, there would not be a contract enforceable at law, and, if both these essentials are present, it would be a contract enforceable at law.* By this decision I make the contract binding on the minor which is not done in England. But to my mind, considering the difference between the social customs and manners of people in England and in this country, there is much less hardship and much less harm in my holding that the natural guardian of a minor is entitled to make a contract of marriage binding on the minor than to hold otherwise; as to hold otherwise would mean that no one could make a contract of marriage for his minor daughter for fear that the other party may at any time put an end to it without incurring any liability. The breach of a promise of marriage has much more serious consequences in India in the case of girls, inasmuch as the chances of the girl making another good match are seriously affected. I for my part am not disposed to read that result in the Privy Council judgment. In my opinion it would be revolutionizing the manners and customs of the people here if I were to hold that a contract of marriage could not be entered into by a natural guardian for a minor girl."

[54] In *Mulji Thakersey v. Gomti and Kastur*, 11 Bom 412, plaintiff No. 1 was the father of plaintiff No. 2 and defendant No. 1 was the mother of defendant No. 2 who was her daughter. It was held that defendant No. 1 had committed a breach of the agreement by not giving her daughter (defendant No. 2) in marriage to plaintiff No. 2, and a decree was passed against defendant No. 1 for *inter alia* damages for breach of the contract. But the suit against defendant No. 2 was dismissed as it was held that defendant No. 2 being a minor, was not liable in respect of that contract. This judgment was not cited before Taraporewala J. In view of the judgment in *Mulji Thakersey v. Gomti and Kastur*, 11 Bom 412, it is difficult to see how Taraporewala J. held that the guardian had the power to enter into the contract of marriage on behalf of the minor so as to bind the minor.

[55] In *Waghela Rajsanji v. Shekh Masludin*, 14 I. A. 89: (11 Bom. 551 P. C.), the Privy Council said at p. 96:

"Now it was most candidly stated by Mr. Mayne who argued the case on behalf of the respondent, that there is not in Indian law any rule which gives a guardian and manager greater power to bind the infant ward by a personal covenant than exist in English law. In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of his ward, so as to impose a personal liability upon the ward, and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward, and that so far as this suit is founded on the personal liability of the talukdar, it must fail."

[56] In *Maharana Shri Ranmalsingji v. Badilal Vakhatchand*, 20 Bom. 61, it was held that a minor cannot be bound personally by contracts entered into by a guardian which do not purport to charge his estate and that Act xx of 1864 gave no power to a guardian or administrator to bind his ward by personal covenants.

[57] The case of *Fernandez v. Gonsalves*, 26 Bom. L. R. 1035: (A. I. R. (12) 1925 Bom 97), was approved by the Appeal Court in *Khimji Kuverji v. Lalji Karamsi*, 43 Bom. L. R. 35: (A. I. R. (28) 1941 Bom. 129), though nothing is stated about what Taraporewala J. described as the first essential, i. e. "the power of the guardian to enter into the contract on behalf of the minor so as to bind the minor."

[58] The head-note of the case in *Khimji Kuverji v. Lalji Karamsi* (43 Bom. L. R. 35: A. I. R. (28) 1941 Bom. 129) reads as follows:

"Amongst Hindus a contract of marriage entered into on behalf of a minor by the minor's legal guardian

and shown to be for the minor's benefit is enforceable at the instance of the minor.

Where a contract of marriage was entered into between the mother of the plaintiff, who was a minor Hindu girl, acting as her guardian and on her behalf, and the father of the defendant on behalf of the defendant who was a Hindu and a major, Held on consideration of the habits and customs prevailing amongst Hindus, that the contract being for the benefit of the minor girl could be enforced by her, and she could maintain a suit for damages for breach thereof by the defendant."

[NOTE:—The reference to the case of *National Petroleum Company v. Popatlal*, 38 Bom. L. R. 610 : (A. I. R. (23) 1936 Bom. 344), in the judgment of Beaumont C. J. at p. 46 of that report is a mistake for *Great American Insurance Co. v. Madanlal Sonulal*, 37 Bom. L. R. 461 : (A. I. R. (22) 1935 Bom. 353).]

[59] It is the decisions as to the minor's right to sue for damages in cases of breaches of contracts of marriage that have caused me the greatest difficulty in arriving at the decision which I have ultimately arrived at in the case. In contracts of marriages as well as service, the contracts are by their nature executory, and they are entered into for the benefit of the minors. There is, however, the following point of distinction. A contract of marriage is not void for want of consideration as a contract of service by a minor is. The minor in the case of a contract of marriage is very often, in this country, of a very tender age. Even where the minor is of an understanding age, it is not the minor's promise, if any, to marry, which the other party relies upon for the performance of the contract. The only consideration for a marriage contract is the promise of the father that the minor will fulfil his contract by the minor's marriage at a future date, and the reciprocal promise of the other party to the contract. These reciprocal promises form the only consideration for each other and they result in a contract. The parties rely on the respectability of the father for the fulfilment of the contract. The father very often brings his personal influence to bear on the minor so that the father's contract may be honoured. Sometimes the minor carries out the father's promise at the cost of his personal happiness. In a contract of service, what the other party relies upon is the promise of the minor to serve and his actual service from day to day. The employer agrees to pay the salary specified not merely because the father has promised that the minor will serve in terms of the contract. In my opinion a minor's contract of marriage is, therefore, not void for want of consideration as a contract of service by a minor is.

[60] Is there no benefit that the minor derives by reason of my holding that such contracts of service are void according to Indian

law? Contracts of service like other contracts to be carried out *in futuro* involve a certain element of speculation. It may be that a contract of service by a minor, which is beneficial at the date it is entered into, may by reason of change of circumstances not be beneficial to him at a future date. He may, while the contract is only partly executed, obtain better terms at a future date, and those better terms may be due to the very service he has put in under the first contract. I take it to be the English law that if a contract of service is beneficial to the minor at the date it is entered into, he is not entitled to repudiate it, because of the better terms he may obtain at a future date. In Indian law, the contract being void, he is at liberty to take up service on better terms, even while the first contract remains executory and unfulfilled. I realize that contracts of marriage of minors involve a greater amount of speculation than other contracts. One may go further and say that marriage is a gamble and not a mere matter of speculation. But contracts of marriage have been recognized by a series of decisions now extending over several years as valid, if they are entered into by the guardian for and on behalf of and for the benefit of the minor. For the reasons which I shall presently mention they must be held to be enforceable by the minors personally, even though they are not enforceable against minors.

[61] It being conceded that such a contract of marriage is valid, the next question is: is it right in principle that the minor by himself can sue the other party in respect of such a contract without joining the father as a party to the suit? In principle there does not seem to be any objection. The father cannot set aside such a contract as he can set aside a commercial contract at his pleasure nor give the benefit of the contract to another party. The argument that the other party contemplated liability to the father only because he was the party to the contract is also devoid of substance. The principal liability of the other party in such a case is to the minor. The father's rights are in the nature of a trustee's rights, and they exist only for the benefit of the minors. If, for instance, ornaments and clothes are given by way of gift to the minor in pursuance of such a contract, the father's right to recover the same from the other party, if they are in his possession, is only for the benefit of the minor. So also damages which the father may recover in the case of a breach of contract must be held by the father for the benefit of the minor. If such damages are paid to the father by the other party, the moneys so lying in the hands of the father are not his property, and if he becomes insolvent, they

would not vest in the Official Assignee as the assets of the insolvent. Though the father does suffer in his reputation by reason of the breach of contract of marriage, what he contracts for is not for the preservation of his reputation or happiness but for that of the infant. The other party contracts a direct obligation to the minor and undertakes to pay such damages as the minor (and not the father) may sustain. The cause of action then is complete in the minor and it is not necessary that the father should be joined as a party to the action.

[62] The case of a contract of service stands on a different footing. So far as contracts of service are concerned, there is no reason why the father should not remit performance of it, if for instance he realizes that it is the minor and not the employer who is at fault. To allow the minor, represented by a next friend in the suit, to sue the employer in such a case would seriously prejudice the employer. But the main ground on which I hold that the contract of service entered into by a father on behalf of the minor is not enforceable, is that it is void for want of consideration. Besides the minor in a contract of service is not seriously prejudiced because, as I have stated before, he can always recover the amount of the salary actually earned by him or he may obtain employment on better terms, or an employment which is more suited to his temperament or natural aptitude.

[63] I have carefully considered the expression "on behalf of and for the benefit of the minor" as used by our Appeal Court and Taraporewala J. in the case of suits by minors for the recovery of damages for breach of contracts of marriages; but I am not prepared to rely on that expression, when I am considering the case of a contract of service, as the deciding factor which should compel me to hold that the minor in the case of such a contract of service is entitled to sue in his own name. In my opinion the father of the minor in a contract of service does not occupy the position of a trustee within the meaning of the abovementioned decision of the House of Lords in *Les Affreteurs Reunis Societe Anonyme v. Leopold Walford (London) Limited*, 1919 A. C. 801; (88 L. J. K. B. 861), though he does occupy such position in the case of a contract of marriage entered into by him on behalf of and for the benefit of the minor.

[64] I, therefore, decide issue No. 3 against the plaintiff.

[65] 22nd July 1948.—After I pronounced my judgment on issue No. 3 on 21st July 1948, on coming to Court on 22nd July I inquired of counsel whether it was not in the interests of parties that I should try issues Nos. 1 and 2 also.

For instance, if on hearing evidence I came to the conclusion that the defendant did not enter into any oral agreement with the plaintiff's father as alleged in para. 1 of the plaint, the suit in my opinion would fail. The suit is not on the footing of a contract entered into by the plaintiff herself with the defendant, though it is the defendant's case that the plaintiff herself entered into the contract with the defendant and that the defendant was not aware of the plaintiff's minority. It is clear that entirely different considerations would apply if the plaintiff had filed this suit on that footing. I am not prepared to allow at this stage to convert the suit into a suit of that nature. Both counsel agreed with me and, thereupon, I decided to try issues Nos. 1 and 2 as preliminary issues along with issue No. 3.

[66] If my judgment on issues Nos. 1 and 2 is against the plaintiff and it is held in appeal to be incorrect, the suit may be decided on issue No. 3. If my judgment, on the other hand, on issues Nos. 1 and 2, assuming it to be against the plaintiff, is correct, then a finding on issue No. 3 may be unnecessary.

[67] At the request of Mr. C. J. Shah who says his witness on issues Nos. 1 and 2 is not in Court, I adjourn the suit to Monday, 26th July 1948.

[68] 26th July 1948.—At this stage counsel for the parties state that the suit has been settled.

[69] *Per Curiam*. — By consent suit dismissed. Counterclaim dismissed. No order as to costs.

R.G.D.

Suit dismissed by consent.

A. I. R. (36) 1949 Bombay 226 [C. N. 62.]

WESTON AND CHAINANI JJ.

G. B. Ghatge — Petitioner v. Emperor.

Criminal Revn. Appln. No. 894 of 1948, Decided on 14th September 1948.

Penal Code (1860), Ss. 88 and 89 — Child over 12 years receiving moderate punishment from school authority—No offence committed by authority.

When a child is sent by its parent or its guardian to a school, the parent or guardian must be held to have given an implied consent to its being under the discipline and control of the school authorities and to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline or for correcting the child. The above principle applicable in respect of children under 12 will also apply in the case of children over 12, and when a child over 12 years of age goes to a school, it may be assumed that the child gives an implied consent to subject itself to the discipline and control of the school authorities and to receiving such reasonable and moderate corporal punishment as may be necessary for its correction or for maintaining school discipline. [Paras 4 & 5]

Hence the teacher in administering corporal punishment to the child is not guilty of any criminal offences.
Case law relied on. [Para 10]

Annotation: ('46-Man.) Penal Code, S. 89 N. 1.

M. A. Coelho and B. G. Pradhan—for Petitioner.

S. Kamalakar—for Opponent.

H. M. Choksi, Government Pleader—for the Crown.

Chainani J.—This is an application in revision by one G. B. Ghatge, who is the Principal of the Hume High School, Victoria Gardens Road, Bombay, against his conviction under S. 323, Penal Code, and the sentence of fine of Re. 1 imposed on him.

[2] The complainant is one Abdul Jaffar Ismail Sheikh, a boy of about 15 years of age, who was a student in the 6th standard in the Hume High School, of which the accused applicant was the Principal. On 6th October 1947, in the morning the applicant was conducting 4th standard class. He then found that the complainant had been driven out of his class by Mr. Saraf, who was then teaching Algebra to the students in the 6th standard. The applicant enquired from Mr. Saraf and was informed by him that the complainant had misbehaved in the class. There is some dispute with regard to the nature of the misbehaviour, but that is not material for the purposes of this case. The applicant then gave some strokes with a cane to the complainant on his body. The applicant's case is that he had given only two cuts with a cane on one of the hands of the complainant, while, according to the complainant, he was given five or six strokes, two on one of his hands and three or four on other parts of his body. The learned Magistrate has accepted the complainant's statement on this point; and we must accept that finding, as it is on a question of fact.

[3] The material question in this case, however, is whether the applicant is guilty of any criminal offence. There is no doubt that in English law it is recognized that a school master may inflict corporal punishment on a pupil for purposes of correction or enforcing school discipline. In *Regina v. Hopley* (1860) 2 F. & F. 202, Cockburn C. J. has observed (p. 206):

"By the law of England, a parent or a school master (who for this purpose represents the parent and has the parental authority delegated to him), may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment, always, however, with this condition, that it is moderate and reasonable."

In *Mansell v. Griffin*, (1908) 1 K. B. 160, it has been held that a teacher in a public elementary school has authority to inflict corporal punishment on a pupil, if the punishment inflicted is moderate, is not dictated by any bad motive, is such as is usual in the school, and such as the parent of the child might expect that the child would receive if it did wrong. See also

Rex v. Newport (Salon) Justice : Wright, Ex parte, (1929) 2 K. B. 416 : (98 L. J. K. B. 555) and *Cleary v. Booth*, (1893) 1 Q.B. 465: (62 L.J.M.C. 87).

[4] In India, the question must be decided by reference to the provisions of the Penal Code. Section 89 of the Code states that nothing which is done in good faith for the benefit of a person under twelve years of age, or of unsound mind, by or by consent, either express or implied, of the guardian or other person having lawful charge of that person, is an offence by reason of any harm which it may cause, or be intended by the doer to cause or be known by the doer to be likely to cause to that person. The complainant is a Muslim, and in para. 265 of his book on Muhammadan Law, Mr. Tyabji has stated as follows (p. 296) :

"The guardian of the ward's person may restrain and control the acts and conduct of the ward; and the father may by personal and other chastisement to a reasonable extent inflict correction on the child, for disobedience to his orders. These rights may be delegated by the guardian or father respectively to a tutor, or schoolmaster, or other person."

Sub-section (4) of S. 9, Bombay Children Act, 1924, provides that nothing in that section shall be construed to take away or affect the right of any parent, teacher or other person having the lawful control or charge of a child to administer punishment to such child. This shows that the Legislature also recognizes the right of a parent or teacher of a child to administer punishment to it. It has been held that while the child is at school, the schoolmaster is in the position of a parent, that the parental authority is delegated to the schoolmaster, and that the schoolmaster represents the parent for the purposes of correction: see *Regina v. Hopley*, (1860) 2 F. & F. 202, *Fitzgerald v. Northcote*, (1865) 4 F. & F. 656 and *Cleary v. Booth*, (1893) 1 Q. B. 465 : (62 L. J. M. C. 87). When a child is sent by its parent or its guardian to a school, the parent or guardian must be held to have given an implied consent to its being under the discipline and control of the school authorities and to the infliction of such reasonable punishment as may be necessary for the purposes of school discipline or for correcting the child. This principle has been accepted by the Rangoon High Court in *King-Emperor v. Maung Ba Thaung*, 3 Rang. 659 : (A. I. R. (13) 1926 Rang. 107 : 27 Cr. L. J. 626). In that case a schoolmaster was prosecuted under S. 323, Penal Code, for caning a school boy under his charge. It was not suggested that the schoolmaster was actuated by improper motives or that he was not acting *bona fide* in the interest of the school discipline or that the punishment was unduly excessive. It was held that the schoolmaster had committed no offence, in view of the provisions of S. 89, Penal Code.

[5] Section 89, Penal Code, however, applies in the case of children under 12 years of age. The complainant is 15 years old. The relevant section applicable in this case is S. 88, which provides, *inter alia*, that nothing, which is not intended to cause death, is an offence by reason of any harm which it may cause to any person for whose benefit it is done in good faith, and who has given consent, whether express or implied, to suffer that harm, or to take the risk of that harm. The principle referred to in the previous paragraph in respect of children under 12 will also apply in the case of children over 12, and when a child over 12 years of age goes to a school, it may be assumed that the child gives an implied consent to subject itself to the discipline and control of the school authorities and to receiving such reasonable and moderate corporal punishment as may be necessary for its correction or for maintaining school discipline. Under the Penal Code, a valid consent to suffer harm may be given by a person over 12 years of age; see S. 90.

[6] We have been referred to a circular issued by the Educational authorities, which states :

"Corporal punishment shall not be inflicted, except by the Head-master, and by him only, in the case of serious and repeated misconduct. Only a light cane should be used when corporal punishment is considered absolutely necessary and the caning should be restricted to the palms of the hand. When corporal punishment is inflicted, reasons in writing should be recorded by the Head-master."

This circular shows that the Educational authorities in this Province also recognize that in certain circumstances it is necessary for the welfare of students to administer corporal punishment to them. The Madras High Court has taken a similar view in *Sankunni v. Swaminatha Pattar*, 45 Mad. 548 : (A. I. R. (9) 1922 Mad. 200). It is true that the case before the Madras High Court was an appeal from a suit for damages, but the principle of law enunciated is the same, viz., that a school-master as delegate of the parent may for the purpose of correction inflict moderate and reasonable corporal punishment on the child.

[7] The learned Magistrate has found that the applicant had given 5 or 6 strokes to the complainant, as the complainant was guilty of misconduct in his class. The punishment was, therefore, obviously awarded both in the interest of the complainant and in that of school discipline; and as, by joining the school, the complainant had impliedly consented to receiving such punishment, the applicant will not be guilty of any criminal offence, unless it is shown that he had not acted in good faith.

[8] The learned Magistrate has held that the punishment imposed was excessive. He has drawn

this conclusion from his finding that the applicant had given 5 or 6 strokes with a cane to the complainant. It has been urged by the learned Government Pleader that this conclusion is binding upon us. We do not agree with this view. The only reason for the learned Magistrate's coming to this conclusion is that the complainant had been given 5 or 6 strokes with a cane. There is, however, no evidence to show what kind of cane it was, with what force the strokes were given or even what kind of injuries had been caused to the complainant. The Magistrate has in his judgment referred to the evidence of Mr. Wable, who is the Personal Assistant to the Educational Inspector and who has stated that the complainant had gone to him and told him that two days previously he had been assaulted by the Principal, and that he then saw 3 or 4 red marks on the buttocks of the complainant. It is not clear from the record when Mr. Wable's evidence was recorded by the Magistrate. His Head-clerk, Mr. Trivedi, was examined on 18th February 1948. Mr. Wable was, therefore, probably examined at the previous hearing, that is on 21st January 1948. The judgment was delivered on 13th March 1948. The record does not contain any notes of evidence, and it, therefore, appears that what the learned Magistrate has stated in his judgment with regard to the evidence given by the various witnesses is based entirely on his impressions of what the witnesses had deposed six or seven weeks before he delivered his judgment on 13th March 1948. The complainant had been to a doctor on the same day on which he received the punishment, but the doctor has not been examined. In the application made to this Court by the applicant, it has been stated that in his cross-examination the complainant had admitted that the doctor had told him "Kuch Nai Huva, Jao" (there is nothing wrong, go away). We have not been able to verify this statement, in view of the fact that no notes of evidence are before us. According to Mr. Wable he had advised the complainant to approach a Court of law, when he saw him on the third day of the incident. The complaint was, however, not filed until 8th November, that is more than one month after the incident. This would also suggest that the injuries, if any, received by the complainant were trivial, and that the complaint was subsequently filed for some other motive.

[9] We are not satisfied that the punishment awarded in this case was either excessive or immoderate. It is true that the applicant did not quite follow the procedure which has been laid down by the Educational Authorities for imposing corporal punishment. This by itself would not show that he did not then act in good faith.

It may also be noted that the applicant punished the complainant not for offering any insult to him personally or for misbehaving in his class, but for misconduct committed in the class in charge of another teacher, Mr. Saraf. In punishing the complainant, the applicant does not, therefore, appear to have had any other object, except that of correction or maintaining the school discipline.

[10] In our opinion, therefore, the applicant's act in administering corporal punishment to the complainant is covered by section 88, Penal Code. He is consequently not guilty of any criminal offence. It has been urged in the course of the arguments that the applicant is also protected by ss. 79 and 92, Penal Code. We are, however, of opinion that these sections have no application to the facts of this case.

[11] As, therefore, the applicant is not guilty of any criminal offence, we set aside his conviction and the sentence passed upon him. The fine, if paid, be refunded.

D.H.

Conviction set aside.

A. I. R. (36) 1949 Bombay 229 [C. N. 63.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

The Municipal Corporation for the City of Bombay and another — Appellants v. Govind Laxman Savant—Respondent.

O. C. J. Appeal No. 53 of 1948 and Misc. Appln. No. 204 of 1948, Decided on 5th November 1948.

(a) Specific Relief Act (1877), S. 45 — Municipal corporation proposing to spend municipal fund contrary to the provision of S. 118, City of Bombay Municipal Act — Rate payer can proceed under S. 45 to prevent misapplication of money—He need not file suit—Order under S. 45 is discretionary—Cause of action for application under S. 45 or for suit for similar relief is same — Petitioner may fail under S. 45 yet succeed in suit — Conditions for application under S. 45 and suit, stated — Specific Relief Act (1877), S. 42.

A rate-payer is undoubtedly interested in the application of the municipal fund both as a rate-payer who has actually contributed to that fund and also as a beneficiary who is entitled to the various benefits which accrue to the citizens by the application of that fund. All the moneys credited to the fund are held by the corporation under S. 111, City of Bombay Municipal Act, 1888, in trust for the purposes of the Act. If the municipal fund is proposed to be misapplied contrary to the provisions of S. 118, City of Bombay Municipal Act, 1888, the rate payer is a person whose property would be injured within the meaning of S. 45, Specific Relief Act. Under S. 45, Specific Relief Act in order to satisfy the first proviso a party must have some interest in property, franchise or personal right, the injury to which alone would entitle him to maintain a petition under that section. No particular quantum of right is necessary in order to entitle that person to come under that section. There is no difference in principle between the title which would entitle a person to sue for redress for an injury done to his property, and the title which would be equally necessary to make a petition under S. 45 maintainable. It is perfectly true

that the law ordinarily discourages a large body of persons who have a common interest from litigating with regard to their interest in separate suits. The policy of the law is that in such cases a representative suit should be brought in which the interest of all should be finally and completely adjudicated upon. But to this ordinary rule there are certain exceptions, and the most important exception is that when you have members of a corporation who are all equally interested in the corporation carrying out its activities according to its charter, if the corporation acts illegally or contrary to its charter or misapplies its funds, then every member of the corporation has the right to file a suit to prevent the corporation from so acting. The same principle applies to a rate-payer. Every rate-payer has a right to prevent the public body to which he pays the rates from acting contrary to law or contrary to its own charter. In these cases the law assumes that the member of the corporation or the rate-payer has a specific legal interest which entitles him to come to Court in support of his right and in order to prevent the corporation or the public body from acting contrary to law or their own charter. There is no reason in principle why the member of the corporation or the rate-payer should only come to Court by way of a suit, and why he should be debarred from invoking the jurisdiction of the Court under S. 45. Whether a relief would be granted to him under S. 45 or not is another matter. [Paras 1, 2 & 9]

Section 45 is a summary procedure and the order to be made is entirely discretionary with the Court, and before the Court would exercise the discretion, the various conditions laid down in S. 45 which are all cumulative must be satisfied. Therefore it may be that whereas in a particular case a petitioner may fail to get an order under S. 45, and yet he may succeed in invoking the aid of the Court in a suit filed by him. But that does not mean that the cause of action is any different in a suit or under S. 45. The title which the petitioner or the plaintiff has to establish, the interest which he has got to prove is identical in both cases. He must show that there is an invasion to his property, franchise or personal right, and there can only be an invasion provided he has a legal specific right in property or in franchise or he has some personal right: 32 Bom. 466 (P C) and (1897) 1 Q. B. 498, *Ref.*; A. I. R. (12) 1925 Cal. 48 and A. I. R. (12) 1925 Cal. 373, *Commented*; 22 Bom. 646, *Rel. on*; A. I. R. (26) 1939 Bom. 431 *held obiter*; (1894) L.R. 2 Ir. 489, *Considered*. [Para 2]

(b) Specific Relief Act (1877), S. 45 — English principles regarding issue of mandamus can be imported.

Section 45 deals with a procedure which in England corresponds to issuing of a high prerogative writ, and the principles of English law dealing with the writ of mandamus must be imported in considering the provisions of S. 45. [Para 2]

(c) Specific Relief Act (1877), S. 45—Essentials—Special injury is not necessary — Any injury likely to occur to title to property is enough.

No special injury has got to be established by the petitioner before he can come under S. 45. If he shows any injury and he also shows a title to his property which is likely to be injured, that is sufficient to satisfy the first proviso to S. 45: A. I. R. (12) 1925 Cal. 48, *Dissent*. [Para 5]

(d) Specific Relief Act (1877), S. 46—There should be first demand for justice and specific denial of it by respondent before petitioner can apply under S. 45—Specific Relief Act (1877), S. 45.

Section 46 requires that there should first be a demand for justice and a specific denial of that justice by the respondent. Such a presumption cannot be drawn

ex post facto even though the respondents may ultimately resist any application made by the petitioner under S. 45. [Para 10]

(e) Specific Relief Act (1877), S. 45 (d) — "Other specific and adequate legal remedy" means remedy which is immediately available and not remedy which can be brought only after giving notice for stated period, in cases of urgency—Rate-payer wanting to restrain Municipality from expending municipal fund contrary to provisions of City of Bombay Municipal Act — Two remedies available, one by way of application under S. 45 and other by suit under S. 42 read with S. 54 — For suit previous notice of one month under S. 521, City of Bombay Municipal Act essential — By recourse to suit rate-payer not able to get injunction under S. 54, earlier than one month — Filing of suit not being as efficacious a remedy as application under S. 45 is not "other specific legal remedy"—City of Bombay Municipal Act (III [3] of 1888), S. 521. [Para 11]

(f) Interpretation of statutes — Hardship — It is no concern of Court—But construction should not lead to anomalies or insuperable difficulties.

Courts, while interpreting a section of a statute, are really not concerned with the practical difficulties that may result in their giving a particular interpretation to it although they do not construe a particular section in a statute in such a way as would result in anomalies or insuperable difficulties unless the plain language of the section drives the Court to such a conclusion.

[Para 12]

(g) City of Bombay Municipal Act (III [3] of 1888), S. 70 (b) — Specification of price in contract, means that it should be explicitly mentioned — It does not mean specification of fixed price — Price may be mentioned to be ascertained at future date by commissioner after taking certain circumstances into consideration.

All that S. 70 (b) requires is that the price has got to be specified in the contract, and specifying the price only means that it should be explicitly mentioned, or, in other words, perusing the contract it should be clear as to what is the price which the Municipality has to pay to the contractors for carrying out the contract. The statute does not say that the contract must state a fixed price or a price ascertainable in rupees, annas and pies at the date when the contract is entered into. Nor is there any prohibition in the statute which precludes the Municipality from fixing a price which may be ascertained at a future date or may be ascertained by some person specially nominated under the contract by the parties. Under S. 9, Sale of Goods Act, the price in a contract of sale may be fixed by the contract or may be left to be fixed in the manner thereby agreed. Therefore, although a fixed amount may not appear in a contract nevertheless the price may be specified which would be fixed in the manner agreed to by the parties under the contract itself. Where a certain price is fixed but the parties agree that that price is subject to certain variations to be determined by the Commissioner under certain eventualities, that is as much a price as a fixed price in terms of rupees, annas and pies. It is not therefore correct to say that the price in this contract is not specified, nor is it correct to say that the Municipality is compelled by the statute in every contract to provide for a fixed amount calculable in rupees, annas and pies as the price under the contract. [Para 12]

(h) Specific Relief Act (1877), S. 45 — Public officer departing from path of rectitude—Duty of Court while making remarks in judgment pointed out — Civil P. C. (1908), O. 20, R. 4.

When a Court or a Judge comes across any case where it finds that public officer has departed or deviated from the path of rectitude, the Court or the Judge should in no uncertain terms condemn such action on the part of the public officer. But it is equally of importance and essential that when a public officer is conscientiously doing his duty, the Court should not permit any suggestions to be made with regard to his impartiality and integrity. There is nothing easier for a party than to fling mud at persons who very often find it very difficult to defend their conduct and it is the duty of the Court to protect public officers from such mud slinging. [Para 13]

Annotation : ('44-Com.) Civil P. C., O. 20, R. 4, N. 6 Pt. 12.

Sir Jamshedji Kanga and Y. B. Rege—

for Appellants.

*M. P. Amin, Acting Advocate General and R. B. Kantavala—*for Respondent.

Chagla C. J.—The Municipality of Bombay decided to improve and increase the water supply of the City of Bombay and with that view it decided to launch what is popularly known as the Vaitarna-cum-Tansa Project. That project involved the building of a new pipe line 96" from Tansa. In order to carry out the work the Municipal Commissioner invited tenders on 18th March 1948, and in response to this invitation three contractors submitted tenders and these tenders were Nos. 7, 8 and 9 which dealt with different portions of the pipe line. The first contractor that submitted the tender was Rawji Sojpal who submitted all the three tenders Nos. 7, 8 and 9, and the total amount was Rs. 72,94,055. The Hindustan Construction Co., Ltd., also submitted all the three tenders and the total amount of their tenders was Rs. 72,29,394. Messrs. S. B. Joshi & Co. submitted only one tender, No. 7, and their tender was for Rs. 28,89,952. With regard to the Hindustan Construction Co., Ltd., they sent a letter along with their tender and they stipulated that the whole of that letter was to be considered as part of the tender, and in that letter they pointed out that although the Municipality required the work to be done within a period of 720 days, they were prepared to finish the work in 600 working days. They also made it a condition of the contract that the rates quoted by them should be suitably adjusted if the price of materials, fuel, oils, sales tax and labour costs altered, inasmuch as the tender they had submitted was on the basis of prevailing rates. They also required that the cost of cutting trees and also of de-watering of foundations of culverts and cross-drainage works should be paid for. Ultimately it was agreed that the price for cutting trees and de-watering should be fixed at Rs. 30,000, and, therefore, this sum of Rs. 30,000, was added to the amount mentioned in the tender of the Hindustan Construction Co., Ltd. On 29th May 1948, the Commissioner made his report to the Standing Committee and in that report he

recommended that the tender of the Hindustan Construction Co., Ltd., should be accepted. The Standing Committee accepted that recommendation on 16th June 1948, and authorised the Commissioner to execute a contract with the Hindustan Construction Co., Ltd. As the amount sanctioned was to be spent not only during the current financial year, but had to be spread over beyond the financial year, under the Municipal Act the sanction of the Municipal Corporation was required and that sanction was obtained on 21st June 1948. On 29th July 1948, the petitioner and the respondent before us addressed a letter to the Municipal Commissioner and he addressed a similar letter to the Mayor and the members of the Corporation on 30th July 1948, complaining against the tender submitted by Hindustan Construction Co., Ltd., and alleging that the tender was illegal and that the Municipality had no authority to enter into a contract with the Hindustan Construction Co., Ltd., in terms of the tender and asking both the Commissioner and the Municipality to desist from entering into the contract. On 2nd August the petitioner filed a petition in this Court under S. 45, Specific Relief Act, 1877, praying that the Municipal Commissioner and the Corporation be ordered to forbear from concluding and executing the contract with Hindustan Construction Co., Ltd., and also that they be ordered to invite fresh and proper tenders. The petition came on before Bhagwati J. and Bhagwati J. made the order prayed for. From that order of the learned Judge the Municipal Corporation and the Municipal Commissioner have come in appeal before us.

[2] The first question that has been argued before us by Sir Jamshedji Kanga is that the petition filed by the respondent is not maintainable inasmuch as the conditions laid down in S. 45, Specific Relief Act for the maintainability of the petition have not been satisfied. In the first place it is contended that the petitioner is not a person whose property, franchise or personal right would be injured by the doing of the act which the Municipality and the Municipal Commissioner threaten to do. It is not disputed that the respondent is a rate-payer and pays municipal taxes. Section 111 defines how the municipal fund is constituted, and among the many items that go to build up that fund one important item is moneys raised by any tax, levied for the purposes of the Municipal Act. That section also provides that all moneys credited to that fund shall be held by the Corporation in trust for the purposes of the Act, subject to the provisions contained in that statute, and S. 118 of the Act defines the various purposes to which the municipal fund can be applied, and briefly those purposes are the carrying out of

the objects of the Municipal Act. Now, the respondent is undoubtedly interested in the application of the municipal fund both as a rate-payer who has actually contributed to that fund and also as a beneficiary who is entitled to the various benefits which accrue to the citizens of Bombay by the application of that fund. The contention of Sir Jamshedji is that before the jurisdiction under S. 45 can be invoked the petitioner must show that he has a legal specific right, a right which is special to himself and which is not shared by him with the community at large. The argument briefly put, on which Sir Jamshedji has strongly relied, is that in this case every rate-payer in the City of Bombay is interested in the proper application of the municipal fund. There is no interest which is special to the petitioner and, therefore, he cannot maintain the petition. It is also suggested that a mere public wrong is not sufficient to entitle a person to maintain a petition under S. 45. He must further show that some private wrong has been caused to him and he has been damnified by that wrong. It is further contended that there is a vital distinction between a legal right which would furnish a cause of action to a party for the filing of a suit and a legal right which would entitle that party to maintain a petition under S. 45, Specific Relief Act. Now, apart from authorities with which I shall presently deal, it would seem clear that under S. 45, Specific Relief Act in order to satisfy the first proviso a party must have some interest in property, franchise or personal right, the injury to which alone would entitle him to maintain a petition under that section. It is difficult to see why under that section a particular quantum of right should be necessary in order to entitle that person to come under that section. It is also difficult to see why there should be any difference in principle between the title which would entitle a person to sue for redress for an injury done to his property, and the title which would be equally necessary to make a petition under S. 45 maintainable. It is perfectly true that the law ordinarily discourages a large body of persons who have a common interest from litigating with regard to their interest in separate suits. The policy of the law is that in such cases a representative suit should be brought in which the interest of all should be finally and completely adjudicated upon. But to this ordinary rule there are certain exceptions, and the most important exception is that when you have members of a corporation who are all equally interested in the corporation carrying out its activities according to its charter, if the corporation acts illegally or contrary to its charter or misapplies its funds, then every member of the

corporation has the right to file a suit to prevent the corporation from so acting. The same principle applies to a rate-payer. Every rate-payer has the right to prevent the public body to which he pays the rates from acting contrary to law or contrary to its own charter. In these cases the law assumes that the member of the corporation or the rate-payer has a specific legal interest which entitles him to come to Court in support of his right and in order to prevent the corporation or the public body from acting contrary to law or their own charter. There seems to be no reason in principle why the member of the corporation or the rate-payer should only come to Court by way of a suit, and why he should be debarred from invoking the jurisdiction of the Court under S. 45. Whether a relief would be granted to him under S. 45 or not is another matter because it is clear that S. 45, deals with a procedure which in England corresponds to issuing of a high prerogative writ, and it is now well established that the principles of English law dealing with the writ of mandamus must be imported in considering the provisions of S. 45. Section 45 is a summary procedure and the order to be made is entirely discretionary with the Court, and before the Court would exercise the discretion, the various conditions laid down in S. 45 which are all cumulative must be satisfied. Therefore it may be that whereas in a particular case a petitioner may fail to get an order under S. 45, and yet he may succeed in invoking the aid of the Court in a suit filed by him. But that does not mean that the cause of action is any different in a suit or under S. 45. The title which the petitioner or the plaintiff has to establish, the interest which he has got to prove is identical in both cases. He must show that there is an invasion to his property, franchise or personal right, and there can only be an invasion provided he has a legal specific right in property or in franchise or he has some personal right.

[3] Sir Jamshedji Kanga has relied on a decision of the Privy Council in *Bank of Bombay v. Suleman Somji*, 35 I. A. 130 : (32 Bom. 466 P.C.) for the proposition that the plaintiff must show some right which he enjoys other than the rights enjoyed by the community at large before he can maintain a petition under S. 45. Turning to that decision we do not think that it lays down the proposition for which Sir Jamshedji contends. In that case (which went from Bombay) a shareholder of the Bank of Bombay sued the Bank for a declaration of his right to inspect and take extracts from the register of shareholders alleging that there were various irregularities in the management of the Bank and that he wanted to communi-

cate with the other shareholders with a view to the improvement of the management of the Bank. Scott J. dismissed the plaintiff's suit. The Court of Appeal reversed that decision and gave him the declaration he sought. From that decision of the Court of Appeal here the Bank of Bombay preferred an appeal to the Privy Council and the Privy Council took the view that the shareholder's suit must fail. In the first place the Privy Council pointed out that under the Presidency Banks Act of 1876 a shareholder had no right to the inspection of the register of shareholders comparable with the right conferred under the Companies Act, and therefore, in the opinion of their Lordships the only right which the shareholder had against the Bank was the right which at common law belonged to every member of the corporation, and that right was a limited right of inspection provided it was shown that such inspection was requisite with reference either to an action already instituted or at least to some specific dispute or question depending in which the applicant was interested. But even in such a case inspection would be granted only to such an extent as might be necessary for the particular occasion. Now, it should be borne in mind that the shareholder was claiming a general and unqualified right of inspection and the Privy Council rejected that right as not founded either on common law or any statute law. Their Lordships point out at p. 137 that every member of the Bank had an interest in the discovery, but none of them had any special interest different from that of his fellow-members, nor had they any definite purpose or object in obtaining the inspection asked for, and inasmuch as he had no special interest, the Privy Council came to the conclusion that he was not entitled to ask for discovery of the register from the Bank. Sir Jamshedji emphasises the passage in the judgment of the Privy Council which says that the plaintiff must fail because he had no special interest which would entitle him to succeed. This passage must be read in its own context, and the special interest to which the Privy Council is referring is the special interest which under common law would entitle a shareholder of a corporation to claim discovery. It is not as if the Privy Council were saying that the shareholder had an interest, but as the interest was shared along with the other members of the Bank and he did not show anything further, his suit was liable to fail. The Privy Council negatived any right whatever in the plaintiff to claim discovery under the circumstances of that case. It was not as if the plaintiff had some interest and the Privy Council were considering the quantum of that interest. The plaintiff lacked any title at all or any interest at all

which would entitle him to the discovery which he claimed. The Privy Council also conceded that the plaintiff had a limited and qualified right of inspection of the register, but that claim was never put forward at the trial, nor was such a claim ever refused by the Bank. At p. 135 the Privy Council deals with the nature of the writ of mandamus, and they say that this particular suit was in the nature of an application for a writ of mandamus, and one of the principles they emphasise is that the writ will not be allowed to issue unless the applicant shows clearly that he has a specific legal right to enforce which he asks for the interference of the Court. The Privy Council do not say that the applicant must have any special legal right; it must be a specific legal right, and, as I have already indicated, after considering the facts of that particular case they came to the conclusion that the plaintiff in that case had no specific legal right whatever to the inspection which he claimed in the suit. The decision of the Privy Council incidentally also makes it clear that there is no difference in principle between the quantum of right which will support an action and the quantum of right which will support an application under S. 45. If Sir Jamshedji's contention was right, although a writ of mandamus could not be issued still a suit would lie because the right claimed by the applicant was not sufficiently wide. But the Privy Council were dealing with a suit and they dismissed the suit and they pointed out that on the same facts a writ of mandamus also could not be issued.

[4] Reliance has also been placed on the decision in *The Queen v. Lewisham Union*, (1897) 1 Q. B. 498; (66 L. J. Q. B. 403). In that case a metropolitan district board of works applied for a mandamus to the guardians of the poor of the district, commanding them to enforce the provisions of the Vaccination Acts generally in their district, and particularly in certain specified instances. The Court of Appeal in England held that the Board of Works had no legal specific right to enforce the performance by the guardians of their duties under the Vaccination Acts, and refused the writ of mandamus. And what is relied on in this case is that the Court of appeal emphasised the fact that the applicant must show that he had a legal specific right to ask for the interference of the Court before a writ of mandamus would be issued.

[5] Strong reliance is placed on the judgment of the Calcutta High Court in *J. M. Sen Gupta v. H. E. A. Cotton*, 51 Cal. 874; (A. I. R. (12) 1925 Cal. 48). In that case Mr. Sen Gupta, a member of the Bengal Legislative Council, moved the Calcutta High Court for an order under S. 45, Specific Relief Act for directing Mr. Cotton,

President of the Council, to decide on the admissibility of a certain motion and to disallow the said motion. The motion related to a grant for the salaries of ministers and according to Mr. Sen Gupta it would be illegal for the Legislature to grant that amount to the ministers, and the question that was raised before Ghose J. was whether Mr. Sen Gupta could maintain the petition. Ghose J. proceeded on the assumption that the applicant paid Government revenue and that the money paid by him constituted a part of the fund out of which the salaries of ministers were to be met. According to Ghose J. the applicant paid Government revenue along with thousands of other people and, therefore, that fact by itself did not entitle Mr. Sen Gupta to maintain the petition. The learned Judge earlier in his judgment lays down the principle of law as being that the person applying for a writ of mandamus must show that he has a real and special interest in the subject-matter under specific legal right to enforce. Therefore the interest must not be merely real, not only specific, but it must be special to the applicant, and in support of this proposition the learned Judge relies on the case to which I have just referred, viz. *The Queen v. Lewisham Union*, 1897-1 Q. B. 498; (66 L. J. Q. B. 403). Now, with very great respect to the learned Judge, he has used the expression "special" which does not occur in that case. That case merely speaks of a specific interest, which is very different from a special interest. The learned Judge also found that Mr. Sen Gupta had suffered some injury, but according to him that injury was not sufficient to entitle him to maintain a petition under S. 45. Therefore, according to that learned Judge, a certain quantum of injury was essential before a petition under S. 45 could be maintained. With very great respect, we see no warrant for holding that a special injury has got to be established by the petitioner before he can come under S. 45, Specific Relief Act. If he shows any injury and he also shows a title to his property which is likely to be injured, that is sufficient to satisfy the first proviso to S. 45, Specific Relief Act. Having rejected Mr. Sen Gupta's petition under S. 45, the same learned Judge dealt with a suit filed by the same Mr. Sen Gupta for the same reliefs and the judgment of the learned Judge in that suit is reported in *Shankar Roy v. H. E. A. Cotton*, A. I. R. (12) 1925 Cal. 373; (85 I. C. 14). The suit that Mr. Sen Gupta had filed was a representative suit on behalf of himself and the other rate-payers, and Ghose J. is at pains to point out that although Mr. Sen Gupta individually had not that interest which would entitle him to maintain a petition under S. 45, there was sufficient interest in Mr. Sen Gupta and the other plaintiffs in their representative capacity to

sustain them—I am using his language—to maintain that suit. Therefore, according to Ghose J. a rate-payer cannot individually complain if the fund in which he is interested is being misapplied. But he could complain if that complaint is on behalf of himself and the other rate-payers and is preferred in a representative capacity. Now, as I have pointed out earlier, again with respect to the learned Judge, this is an erroneous proposition of law and is contrary to a clear and carefully considered decision of our own Court of Appeal which is reported in *Vaman v. Municipality of Sholapur*, 22 Bom. 646. Curiously enough Ghose J. cites that judgment in support of his proposition. But he incorrectly assumes that in *Vaman v. Municipality of Sholapur*, (22 Bom. 646) the suit was filed by the rate-payers in their representative capacity. The same error has crept into Sir Dinshah Mulla's well known commentary on the Civil Procedure Code, because at p. 506 Sir Dinshah Mulla cites this case as an instance of a representative suit under O. 1, R. 8, which a tax-payer may bring against a Municipality on behalf of himself and the other tax-payers to restrain the Municipality from misapplying its funds. Looking to the facts of the case as reported in *Vaman v. Municipality of Sholapur*, (22 Bom. 646), and also the judgment itself it is perfectly patent that the suit was not filed by the rate-payers in their representative capacity, but was filed individually by them. Three rate-payers challenged the right of the Municipality of Sholapur to purchase a band out of the municipal funds, and the District Judge in terms differing from the Subordinate Judge who tried the suit dismissed the plaintiff's suit on the ground that they were not entitled to sue in their individual capacity without proof of special damage. The matter came in second appeal before Parsons and Tyabji, JJ., and at p. 648 Tyabji J., refers to the well established rule that any individual member of a corporation may file a suit for the purpose of restraining the corporation from doing any act which may be illegal or *ultra vires* of the corporation, and the learned Judge says that he sees no distinction in principle between the case of a shareholder and the case of a rate-payer, one suing the corporation and the other suing a public body for the misapplication of funds, and he points out that in the case both of the member of the corporation and of the rate-payer although his interest may be small, it was not less real. After reviewing English and Indian authorities at p. 651 Tyabji J., sums up the position in law thus:

"These authorities seem to me to show very clearly, first that the plaintiffs can sue in their individual capacity if they are sufficiently interested in the muni-

cipal fund, and secondly, that any interest however small is sufficient to entitle them to do so."

Then Tyabji J., emphasises the fact that the plaintiffs were rate-payers and not mere strangers and they were directly interested in the proper application of the municipal funds, and he draws a distinction between rate-payers and the mere inhabitants of Sholapur and he says that absence of interest might have been with some justification alleged against mere inhabitants in contradistinction to rate-payers. Parsons J., in concurring judgment clearly points out that if the plaintiff has any interest then the actual amount of personal interest must be disregarded, and it was sufficient if there was any personal interest at all; and such a personal interest must be held to exist in the case of every individual tax-payer since he was liable to contribute to the fund and could not but be interested in its proper application and Parsons J., refers to Ss. 17 and 18, District Municipal Act of 1873 which are identical with Ss. 111 and 118, Bombay Municipal Act. Therefore, in our opinion this case clearly lays down the proposition that every rate-payer has an interest in the proper application of the municipal fund to which he contributes by paying rates. It is unnecessary to consider the quantum of his interest, because the mere payment of rate is sufficient to qualify him to challenge the illegal and *ultra vires* act of a public authority.

[6] Sir Jamshedji has relied further on the judgment of a single Judge sitting on the Original Side, B. J. Wadia, J., which is reported in *Shankarlal v. Municipal Commissioner of Bombay*, 41 Bom. L. R. 911 : (A. I. R. (26) 1939 Bom. 431). In that case a municipal voter challenged the validity of the electoral rolls prepared by the Municipality on the ground that whereas the Municipal Act required that the names of the voters should be arranged alphabetically, the Municipality had prepared the roll community wise. Wadia J., in terms held that the applicant who came to Court under s. 45, Specific Relief Act to restrain the Municipality had suffered no injury, that he was in no way prevented from voting and that the particular method of keeping the roll had in no way interfered with any right of the applicant. We should have thought that that was sufficient to dispose of the case; but Wadia J., went on to observe that the applicant must show, in order to succeed under s. 45, that he had some special definite individual right of his own in the matter complained of irrespective of his right as a member of the community at large. With respect, it will be noticed that the qualifications are increasing. We have "specific" in the English case, *The Queen v. Lewisham Union*,

(1897) 1 Q. B. 498 : (66 L. J. Q. B. 403), we have "special" in the Calcutta case, (*J. M.*) *Sen Gupta v. H. E. A. Cotton*, 51 Cal. 874 : (A.I.R. (12) 1925 Cal. 48) and now we have "individual right" of the applicant. It is really difficult to understand why if a person has a right, that right loses its validity or becomes of less importance because it is shared with the community at large or with a large number of persons. It is clear that this statement of Mr. Wadia J. is purely obiter, and as it is, the decision in *Vaman v. Municipality of Sholapur*, 22 Bom. 646, was not cited before that learned Judge.

[7] The other case that was cited at the bar is a decision of the Madras High Court in *In the matter of G. A. Natesan and K. B. Ramanathan*, 40 Mad. 125 : (A. I. R. (5) 1918 Mad. 763). In that case Mr. Natesan and Mr. Ramanathan who were members of the Senate of the Madras University protested against a certain resolution of the Senate, and they required the Syndicate to forward their protest to the Chancellor. The Syndicate having refused to do so, they filed a petition under S. 45 for compelling the Syndicate to carry out their requisition. In this case undoubtedly Mr. Natesan and his fellow-member of the Senate had a special interest in the forwarding of the protest which they themselves had lodged. But even so, the Advocate-General on the strength of the decision in *The Queen v. Lewisham Union*, 1897-1 Q. B. 498 : (66 L. J. Q. B. 403), attempted to argue that every member of the Senate was interested along with the petitioners in seeing that the university regulations were carried out and, therefore, the petitioners did not have a special interest which would justify the taking out of a petition under S. 45. That contention was rejected as being wholly fallacious by Mr. Coutts-Trotter J. He points out that a right may be enjoyed in common with every subject of the Crown, but when it is infringed in the case of an individual subject, there at once arises in that individual a further right to seek the protection of the Court to enforce such right. Therefore, the question in every case must be whether a right has been infringed *qua* the petitioner. The mere fact that the petitioner shares the right with other persons cannot debar him from obtaining the necessary relief under the law. And he further points out that the mere fact that the Senate as a whole might have been interested in the maintenance of the rights of one of its members did not preclude Mr. Natesan from litigating his specific right to have his protest forwarded to its proper destination.

[8] Reliance was also placed by Sir Jamshedji on a passage in the judgment of Chaudhuri J.

in *In re Abdul Rasul*, 41 Cal. 518 : (A. I. R. (2) 1915 Cal. 91). The passage is at page 529:

"The rule, on the other hand, appears to be that he alone is a competent relator who has some interest other than such as may belong to the community at large in the question to be tried".

Now, when one looks to the facts of that case, with respect to the learned Judge this particular observation was not at all necessary for the decision of the case. A lecturer of the Calcutta University applied for a writ of mandamus against the University in order that he should be appointed as a lecturer to that University, and what Chaudhuri J. held was that as the lecturer had not established his title to be a lecturer, a writ of mandamus would not lie, and it was further pointed out that there must really be a pre-existing title in the person applying under S. 45, Specific Relief Act, in order that he could maintain such an application. Then we come to an Irish case, *The Queen v. Drury*, (1894) L. R. 2 Ir. 489, which has considerable bearing on the question that we have to decide in this appeal. By 34 & 35 Vic. c. 109, S. 11, the accounts of municipal bodies in Ireland were directed to be audited yearly by the auditor of accounts relating to the relief of the poor in the locality; and, by S. 12, any person aggrieved by the allowance, disallowance, or surcharge of any sum by such auditor could apply to the Queen's Bench for a writ of *certiorari*, and the Court, if it appeared that the auditor's decision was erroneous, could order the payment of such sum improperly allowed, disallowed or surcharged to the party entitled thereto by the party who ought to repay the same. A rate-payer applied for a writ of *certiorari* to remove and quash certain allowances made by the auditor and also for a writ of mandamus to compel him to enforce the disallowances by recovering the amount of the same against whom they had been or should have been certified to be due, and the Irish Court considered whether the rate-payer could maintain this application and whether he was a person aggrieved within the meaning of S. 12 of the English Statute. In the first place, Sir Jamshedji has attempted to distinguish this case by pointing out that what the Court there was doing was merely to construe the expression "aggrieved." Now, even under S. 45, Specific Relief Act a person has to be aggrieved before he can maintain a petition. He is to be aggrieved either in respect of his property or in respect of his franchise or with regard to his personal right. In the second place, Sir Jamshedji has contended that this decision only applies to writs of *certiorari*. But that is not so because the application was both for a writ of *certiorari* and a writ of mandamus, and Sir Peter

O'Brien C. J. began his judgment by pointing out that they had reserved their judgment because it involved important considerations as to the principles upon which the Court should act in granting writs of *certiorari* and *mandamus*. The Chief Justice points out in his judgment that a rate-payer is clearly aggrieved if his money is applied to an unauthorised purpose, which is a typical instance of being aggrieved. The wrong application of money which comes from the rate-payer's own pocket is a very acute grievance. Then he draws a distinction between a rate-payer and a member of the general public and he asks himself the question: "Is it to be said — can it be contended with the semblance of foundation — that there is any analogy between a person like Mr. Bridgeman, whose money is misapplied, and a person who comes forward as a mere member of the general public having no particular interest in the matter?" He then negatives the argument that the fact that the rate-payer's grievance is shared with other rate-payers makes any difference to the position in law. This is what he says (p. 502):

"He is specially, peculiarly, aggrieved by having his money misapplied, and he is not the less so because he shares his grievance with a certain class of rate-payers. It cannot, with any show of reason, be said that he or they are in the position of the general public. The general public are not aggrieved at all. It is the man, and every one of the men, whose interests were directly prejudiced that were aggrieved."

And Johnson J. observes (p. 519):

"It may I think, be taken in general that a person is aggrieved when his legal rights are directly affected by the decision of which he complains, or when he has legal ground for saying that he is 'aggrieved'; and a rate-payer whose pocket is directly affected by a decision allowing the misappropriation of a rate which he is compelled to pay, or its application to purposes which are unauthorised or illegal, is a person whose legal rights are directly affected by such a decision and has legal ground for saying that he is aggrieved by it."

And he further adds:

"And it makes no difference whether he is so particularly aggrieved individually, or is one of a class so particularly aggrieved."

There seems to be no difference in principle between a person aggrieved within the meaning of the English statute and a person injured within the meaning of S. 45, Specific Relief Act.

[9] Therefore, on a review of these authorities it seems clear to us that a rate-payer who has contributed to the rates is injured in his property within the meaning of S. 45 if the rates are misapplied or utilised contrary to the provisions of the law.

[10] The second contention urged by Sir Jamshedji on the maintainability of the petition is that the petitioner has failed to establish that there was a denial by the respondents of the demand of justice as required by S. 46, Specific Relief Act. Sir Jamshedji says that the two

letters addressed by the petitioner to the Commissioner and members of the Corporation, respectively dated 29th July 1948, and 30th July 1948 were received on 30th which was a Friday and the petition was filed on August 2 which was a Monday, and according to Sir Jamshedji the respondents were not given sufficient time to consider the requisitions of the petitioner and to answer those requisitions. Now, in the affidavit made by the petitioner in support of his petition he does say that an assistant of his solicitors Sankershet & Vaidya personally requested the Commissioner and the Municipal Corporation to give him an assurance to carry out the requirements of the two letters, but they did not do so. It is difficult to understand how an assistant of a solicitor, however ingenious a person he may be, could possibly personally interview the whole of the Municipal Corporation at one and the same time. The Advocate-General has pointed out that there is no specific denial of this averment in the affidavit in reply. Even assuming that the Municipal Commissioner did not give the necessary assurance, it is impossible to hold that any opportunity was given to the Municipal Corporation to consider the requisition made by the petitioner. If our view was not against the petitioner on the merits, we should have found it difficult to hold that the requirements of S. 46 were satisfied in this case. After all, an order under S. 45 is in the nature of a high prerogative writ and all the conditions laid down by the statute must be strictly complied with. With very great respect to the learned Judge, we do not agree with his observation that in view of the subsequent attitude taken up by the Municipal Commissioner and the Municipal Corporation it was legitimate to presume that the Commissioner and the Corporation would and in fact did deny the demand of justice of the petitioner. Such a presumption cannot be drawn *ex post facto* even though the respondents may ultimately resist any application made by the petitioner under S. 45, Specific Relief Act. Section 46 requires that there should first be a demand for justice and a specific denial of that justice by the respondent.

[11] It is next submitted that under cl. (d) of S. 45 the petitioner had another specific and adequate legal remedy and therefore no order should have been made under S. 45, Specific Relief Act. Now, the other specific and adequate legal remedy suggested is the filing of a suit. Undoubtedly, the petitioner could have filed a suit for a declaration that the contract to be entered into by the Municipal Corporation was illegal and for an injunction restraining the Municipality from entering into any such contract. But it is to be remembered that before the

petitioner could have filed a suit he would have had to give a notice of one month under S. 521, Bombay Municipal Act and therefore he could not have got any such injunction till the period of one month had elapsed. Sir Jamshedji says that no prejudice could have been caused to the petitioner because it was not likely that the work could have started within such a short time. But, on the other hand, we must bear in mind that if no injunction had been obtained, in all probability the Commissioner would have executed the contract on behalf of the Municipality, certain rights would have come into existence, and the position of the petitioner might have been prejudiced. Therefore we cannot say that the filing of the suit was as efficacious a remedy as an application under S. 45. We are, therefore, of the opinion that the petitioner has established that there was no other specific and adequate legal remedy to which he could have resorted for enforcing his rights.

[12] Now coming to the merits of the petition what is urged by the petitioner is that the contract which the Municipality intended to enter into with the Hindustan Construction Co. Ltd., pursuant to the tender submitted by it was contrary to the provisions of the Bombay Municipal Act. In order to appreciate this contention it is necessary to look at the material provisions of the Bombay Municipal Act. Under S. 69 every contract on behalf of the Corporation is to be made by the Commissioner and every contract which involved an expenditure exceeding five thousand rupees can only be made by the Commissioner provided the approval of the Standing Committee has been previously obtained thereto, and S. 70(b) provides that every contract for the execution of any work or the supply of any materials or goods which involves an expenditure exceeding five hundred rupees shall be in writing and shall be sealed with the common seal of the Corporation and shall specify the work to be done or the materials or goods to be supplied, as the case may be, the price to be paid for such work, materials or goods, and, in the case of a contract for work, the time or times within which the same or specified portions thereof shall be completed. Under S. 72 (1) it is incumbent upon the Commissioner in the case of every contract which involves an expenditure exceeding three thousand rupees to invite tenders for the same, and S. 72 (2) provides that the Commissioner is not bound to accept any tender but may accept only such tender which appears to him, upon a view of all the circumstances, to be the most advantageous, and S. 72 (3) gives the power to the Standing Committee to authorise the Commissioner, for reasons which shall be recorded in the proceedings,

to enter into a contract without inviting tenders. Now in cl. 7 of the general directions to the tenderers which were issued by the Municipal Commissioner, it was provided that no variation in the rates once quoted will be allowed on whatever grounds after the tenders were opened on the due date, and as we have pointed out earlier, in the tender submitted by the Hindustan Construction Co. Ltd., they made a term of their tender which was contained in the letter of 21st April 1948, that their tender was based on the rates of materials, fuel oils, sales-tax, and labour costs, etc., prevailing at the date of the tender and any variation should be suitably adjusted. In the report of the Commissioner to the Standing Committee dated 29th May 1948, attention was drawn of the committee to this term in the tender of the Hindustan Construction Co. Ltd., and the Standing Committee sanctioned the tender of the Hindustan Construction Co. Ltd., with the condition that the final decision with regard to any variation in the rates as per condition No. 7 of the conditions stipulated by the contractors shall lie with the Commissioner. Therefore, in effect it was left to the Commissioner to vary the rates taking into consideration any fluctuations in the price of materials, fuel oils, sales-tax and labour costs. The Advocate-General contends that such a provision in the contract to be entered into with the Hindustan Construction Co. Ltd., is contrary to S. 70 (b), Bombay Municipal Act. The argument advanced is that in view of this provision the price which the Municipality will have to pay to the contractors is not specified and it is left to be determined at a future date by the Commissioner dependent upon various considerations which may come into existence. The Advocate-General's contention is that the whole object of S. 70 (b) is to let a public authority like the Municipality know what its commitments would be in case it sanctions a contract and what amount would have to be paid out of its funds. The law, according to him, does not permit the Bombay Municipality to sanction a contract where it is not in a position to know what its ultimate and final liability would be. The Advocate-General is quite right that although in his report the Municipal Commissioner estimated the total costs of the works, if the contract was given to the Hindustan Construction Co. Ltd., at roughly Rs. 76 lakhs, this figure would certainly be subject to modification dependent upon rise in the costs of materials, labour etc. On the other hand it is pointed out by Sir Jamshedjee Kanga that it would be impossible for the Bombay Municipality to get any contractor to carry out works required to be done for the Municipality if the price was fixed without any consideration as to any fluctuation.

tuations that may take place in the future. It would be all right when the work was of a minor nature and could be carried out within a short time, but if the work was of a very extensive character and would take a considerably long time to carry out, as in this case, no contractor would be willing to take the risk of any serious fluctuations that may take place in the cost of materials and labour. We are really not concerned with the practical difficulties that may result in our giving a particular interpretation to S. 70 (b) of the statute, although it must always be borne in mind that a Court does not construe a particular section in a statute in such a way as would result in anomalies or insuperable difficulties unless the plain language of the section drives the Court to such a conclusion. Now all that S. 70 (b) requires is that the price has got to be specified in the contract, and specifying the price only means that it should be explicitly mentioned, or, in other words, perusing the contract it should be clear as to what is the price which the Municipality has to pay to the contractors for carrying out the contract. The statute does not say that the contract must state a fixed price or a price ascertainable in rupees, annas and pies at the date when the contract is entered into. Nor is there any prohibition in the statute which precludes the Municipality from fixing a price which may be ascertained at a future date or may be ascertained by some person specially nominated under the contract by the parties. Under S. 9, Sale of Goods Act, the price in a contract of sale may be fixed by the contract or may be left to be fixed in the manner thereby agreed. Therefore, although a fixed amount may not appear in a contract, nevertheless the price may be specified which would be fixed in the manner agreed to by the parties under the contract itself. In this case a certain price is fixed, but the parties agreed that that price is subject to certain variations to be determined by the Commissioner under certain eventualities. That is as much a price as a fixed price in terms of rupees, annas and pies. Therefore, in our opinion, it is not correct to say that the price in this contract which the Municipality wants to enter into is not specified, nor is it correct to say that the Municipality is compelled by the statute in every contract to provide for a fixed amount calculable in rupees, annas and pies as the price under the contract. If the Advocate-General's argument was to be accepted, it will result in the most curious results. If the expression "specify" is to be construed as "to fix," then not only the price would have to be fixed, but the work to be done or the materials or goods to be supplied would also have to be fixed in the contract without any possibility of variation and the time within which the work

would have to be carried out would also have to be fixed without any scope for any adjustment. Now in this very tender itself the quantities required to be mentioned are all approximate estimated quantities. They may be less or they may be more, and the contract to be entered into would also be on the basis of these approximate estimated quantities. Therefore, if the Advocate-General was right, it would not be open to the Municipality to enter into such a contract. They must specify (and according to him that means "fix") the actual quantities which the contractor would have to work out. It is hardly necessary to say how impossible such a situation would be. Apart from that, in the form of the tender itself there are various provisions for modifications and variations dependent upon certain contingencies. Under Cl. 35 the cost of the municipal establishment for supervision is to be varied under certain circumstances. Under Cl. 37 the rate for the supply of articles and materials imported is made dependent upon the rate of exchange. Under Cl. 38 the rates of customs duties are taken into consideration. And under Cl. 47 the rates for extra work are laid down, and when this item for extra work does not exceed Rs. 2,000, the rate is to be fixed by the Engineer, and if it exceeds Rs. 2,000, then it is fixed by the Engineer subject to the approval of the Commissioner, and it is provided that no extra work shall be taken without the previous written order of the Engineer. Therefore, Cl. 47 leaves ample scope to the Engineer and to the Municipal Commissioner to ask the contractor to carry out extra work, the cost of which is not known and for which the Municipality would be ultimately liable. Therefore, clearly, if the price is to be fixed in the manner suggested by the Advocate-General, Cl. 47 would be contrary to the provisions of S. 70 (b) of the Act. In England there is a statute from which we ourselves have borrowed S. 70 (b), Municipal Act, and that is S. 174, Public Health Act, 1875. There are various decisions in England on this section. At p. 430 of Lumley's Public Health, Edn. 10, a case is referred to which dealt with a contract to do work for local authority which stipulated that payment for work done should only be made on the production of a certificate from the Engineer appointed under the contract, who was to fix the price of extra work done under the contract but not included in the specification. The particular Engineer whose name was mentioned died and a member of his firm was appointed to carry out his duties under the contract. The contractor contended that the Engineer who was appointed had no jurisdiction to fix the price of extra work. His contention was negatived by the Court. But be it noted that it was never

suggested that the local authority had no power to leave it to the Engineer to fix the price of all extra work done under the contract. Again we find in Hudson on Building Contracts, Edn. 5, p. 171, the statement that where an urban authority enters into a contract under seal, pursuant to Ss. 173 and 174, Public Health Act, 1875, with a contractor to execute works, and the contract contains the usual power for the engineer to vary, alter, enlarge, or diminish the work to be done, all variations and alterations coming within the powers given by the contract can be validly made without being ordered under the authority's seal. Therefore, in our opinion, the contention of the petitioner is not well founded and the price is specified as required by S. 70 (b), Municipal Act, in the contract intended to be entered into by the Municipality.

[13] The next contention urged by the petitioner is that in sanctioning the contract the Standing Committee and the Municipal Corporation acted arbitrarily and, therefore, there was no proper sanction of the contract as required by the statute. When we turn to the petition, we do not find the necessary and proper averment on this point. All that is stated in para. 17 of the petition is that the Standing Committee on the recommendation of respondent 2 without fully applying their mind and without calling for requisite details and information and departmental estimates and without taking expert advice and in negligence of their duties resolved to accept the tenders of Messrs. Hindustan Construction Co., Ltd., and there is a similar averment in para. 18 with regard to the Municipal Corporation. But the learned Judge has read this averment to mean that the act of the Standing Committee and the Municipal Corporation was challenged on the ground of its being an arbitrary or capricious act, and he has come to the conclusion that the petitioner's accusations were justified. Now, the whole suggestion underlying this particular point is—and there is no getting away from it—that the Municipal Commissioner showed a deliberate partiality to the Hindustan Construction Co., Ltd., that he refused to take into consideration the tender of Messrs. Raoji Sojpal & Sons which was more advantageous to the Corporation, that he did not point out to the Standing Committee and the Corporation the various important features in Messrs. Raoji Sojpal & Sons' tender and practically led the Standing Committee and the Corporation to accept the tender of the Hindustan Construction Co., Ltd. Now, this is a very serious charge against a very high public officer in the city of Bombay. We fully realise how necessary purity of public administration is, especially in our newly born State, and we

all realise that when a Court or a Judge comes across any case where it finds that a public officer has departed or deviated from the path of rectitude, the Court or the Judge should in no uncertain terms condemn such action on the part of the public officer. But we think it equally of importance and essential that when a public officer is conscientiously doing his duty, the Court should not permit any suggestions to be made with regard to his impartiality and integrity. There is nothing easier for a party than to fling mud at persons who very often find it very difficult to defend their conduct, and it is the duty of the Court to protect public officers from such mud slinging. With very great respect to the learned Judge, we find in the judgment certain observations which lend support to the insinuation made by the petitioner that the Municipal Commissioner did not act as he should have acted. We have carefully gone through the record of this case, and, as I shall presently point out, in our opinion, the Municipal Commissioner in this case has acted conscientiously with a full sense of responsibility of his duties and there is absolutely no justification for any suggestion that he acted with any impropriety or contrary to the interests of the Municipality which he had to serve as the most important executive officer of that body. It is also to be noted that in the petition itself the petitioner had not the courage to make any suggestion against the Municipal Commissioner. There is no allegation that the Municipal Commissioner acted with any ulterior motive or for a collateral purpose or dishonestly in order to favour the Hindustan Construction Co., Ltd. But the learned Judge seems to have permitted the petitioner to advance this argument in the course of the hearing of this application. Again, we may point out how very necessary it is, before such a charge should be investigated, that there should be proper pleadings and that the charge should be formulated in the petition itself. Now, the whole basis of this attack on the Municipal Commissioner is founded on this. The Hindustan Construction Co., Ltd. quoted the rate of Rs. 39-4-0 for cutting and forming embankments. Messrs. Raoji Sojpal & Sons quoted Rs. 70, but in the conditions which they submitted along with their tender they stated that whenever blasting would be permitted their rates for rock excavation would be Rs. 35 per 100 cubic feet. In the conditions of the tender it was provided by the Municipality that no blasting operation would be permitted within five feet of the pipe line and that blasting operations might be done at the option of the contractor but the contractor would be liable for any damage which may be caused through such operations and

such damage must be set right at his cost. It might be pointed out that in the conditions submitted by Messrs. Raoji Sojpal & Sons they also asked for free medical service for all labour staff which should be made available by the Municipality and that all quarry fees should be paid by the Bombay Municipality. After the tender was submitted Messrs. Raoji Sojpal and Sons on 23rd April 1948, wrote to the Municipal Commissioner drawing his attention to the fact that only Rs. 35 per 100 cubic feet would be the rate charged as against the rate of Rs. 60 if blasting was allowed, and on 3rd May 1948, they again wrote to the Municipal Commissioner asking him that the Municipality should ascertain what quantity could be carried out by blasting operation and thereby find out what benefit the Municipality would obtain by accepting the terms of Messrs. Raoji Sojpal and Sons. To this on 7th May 1948 the Municipal Commissioner replied through the Special Engineer that no question of granting permission for blasting operation beyond the five feet could arise and that the Municipality could not permit the option given to the contractor to be converted into a permission and it was rightly pointed out that if such a thing was done the liability to make good the damage would rest upon the Municipality and not upon the contractor.

[13a] On 10th May 1948, Messrs. Raoji Sojpal & Sons again wrote saying that they would remain responsible for any loss caused by blasting operations due to their negligence. It would be clear that Messrs. Raoji Sojpal and Sons were definitely contracting their liability because under the terms of the tender they were not merely liable for negligence but they were to act as absolute insurers and they were liable in case of any damage, whether due to their negligence or not. Then on 26th May 1948, Messrs. Raoji Sojpal again wrote to the Municipal Commissioner pointing out that according to them two-thirds of the work lay beyond five feet of the pipe line and could be carried out by blasting operation and they would charge at the rate of Rs. 35, and they worked out a statement showing that if their tender was accepted the Municipality would benefit to the extent of Rs. 6 lakhs. Then on 7th June 1948, they varied their rate from Rs. 60 to Rs. 47-8-0, this being a compendious rate whether the work was done by wedging or by blasting. Now, in the report submitted by the Municipal Commissioner to the Standing Committee he has pointed out both the conditions of Messrs. Raoji Sojpal and Sons and the Hindustan Construction Co., Ltd. and he has given a specific reason why he prefers the tender of the Hindustan Construction Co., Ltd. He points out that although the Municipality was prepared to allow

the contractor to carry out the work within 720 working days, the Hindustan Construction Co., Ltd., were prepared to carry out the work within 600 days. That according to him was a very important consideration, as the question of water supply was vital to the city of Bombay. He further pointed out that the Hindustan Construction Co., Ltd., had carried out similar work at the time of the Tansa Quadruplication Scheme, that they were a resourceful firm, a firm of repute, and they had on their staff competent and qualified engineers of all experience. In view of all this he recommended the tender of the Hindustan Construction Co., Ltd., for acceptance. We would again like to emphasise that the statute leaves it to the Municipal Commissioner to decide which tender is the most advantageous upon a view of all the circumstances, and it cannot be said that in making his report the Municipal Commissioner did not take a fair view of all the circumstances and that when he said that the tender of the Hindustan Construction Co., Ltd., was the most advantageous he was doing anything which indicated any partiality to the Hindustan Construction Co., Ltd. or any deliberate hostility to Messrs. Raoji Sojpal and Sons. What is more, the Standing Committee, which was the final sanctioning authority, taking this report of the Commissioner into consideration and all the requisite materials which were before that Committee, came to the conclusion that the Commissioner's view should be accepted and the tender of the Hindustan Construction Co., Ltd., accepted. The matter went further to the Municipal Corporation and the Municipal Corporation took the same view. Now, the learned Judge first makes a point against the Commissioner that he did not try to elucidate from Raoji Sojpal and Sons what their charges for medical attendant and quarry fees which they asked the Municipal Commissioner to bear would amount. It is difficult to understand why the Municipal Commissioner should ask for any further information on this point when the demand made by Messrs. Raoji Sojpal and Sons was contrary to the terms of the tender. Then the learned Judge says that the Municipal Commissioner adopted a different attitude when he came to discuss the tenders which were submitted by the Hindustan Construction Co., Ltd., to the attitude adopted by him with regard to the tender of Messrs. Raoji Sojpal & Sons. There is nothing on the record to show what the Commissioner told the Standing Committee or what discussion took place between the Commissioner and the Standing Committee. But judging by the report, which is the only document before us, the Commissioner has, as we have already pointed out, fairly drawn the attention of the Standing

Committee to the various factors connected with the two tenders of Messrs Raoji Sojpal & Sons and the Hindustan Construction Co., Ltd. Then the learned Judge suggests that the Municipal Commissioner went out of his way to specially recommend the Hindustan Construction Co., Ltd. As I have already pointed out, it was the statutory duty and the obligation of the Municipal Commissioner to recommend that tender which according to him seemed to be most advantageous. He did not go out of his way; he did something which was entailed upon him by the express terms of the Municipal Act. The learned Judge seems to think that the point emphasised by the Municipal Commissioner as to the offer made by the Hindustan Construction Co., Ltd., to finish the work in 600 days instead of 720 days was a form of special pleading adopted by the Municipal Commissioner. Again, the very expression "special pleading" conveys an idea that the Municipal Commissioner had some special interest in the Hindustan Construction Co., Ltd., a suggestion, with very great respect to the learned Judge, without any justification whatsoever as far as the record of this case stands. Then the learned Judge says that it does not appear that the Standing Committee directed their attention to the various letters written by Messrs. Raoji Sojpal & Sons, and he further says that as the Municipal Commissioner was present at the meeting of the Standing Committee he could and should have pointed out the contents of these letters and the implications thereof to the Standing Committee. The resolution of the Standing Committee passed on the very day clearly shows that all the letters of Messrs. Raoji Sojpal & Sons were before the Standing Committee and that they were duly considered by the Standing Committee, and we do not know where the learned Judge—again with respect to him—gets this fact from that the Municipal Commissioner did not draw the attention of the committee to these letters. There is nothing in the affidavits to show what discussion took place before the Standing Committee, and again going merely by the record it is clear that every letter written by Messrs. Raoji Sojpal & Sons to the Municipal Commissioner was placed before the Standing Committee. There was no attempt to suppress any material document. Then the learned Judge says that the Municipal Commissioner remained discreetly silent in regard to the figures submitted by Messrs. Raoji Sojpal & Sons which would show a benefit of about Rs. 6 lakhs to the Municipality. There, again, we do not find any warrant for the statement that the Commissioner remained discreetly silent. He submitted to the Standing Committee the letter of Messrs. Raoji Sojpal

& Sons, and as I have already pointed out, we do not know what discussion took place at the meeting of the Standing Committee. The learned Judge has also a similar uncomplimentary suggestion to make about the Municipal Corporation that they adopted wholesale, without any discussion, the tender submitted by the Hindustan Construction Co., Ltd. We do not know whether any discussion took place in the Municipal Corporation or not, nor do we know what attention was devoted by the members of that Corporation to this particular item on the agenda which concerned the tender of the Hindustan Construction Co., Ltd., and which would involve the Municipality in a very large expenditure. We sincerely hope that there are at least some members of the Municipal Corporation who take their duties seriously and who do attend to the items of work on the agenda. But again, with respect to the learned Judge, there is no warrant for this allegation against the Corporation and all its members that they failed to discharge their duty and accepted whatever the Municipal Commissioner and the Standing Committee told them about the matter.

[14] We, therefore, are of the opinion that the act of the Standing Committee and the Municipal Corporation was not arbitrary and the sanction given by them was a valid sanction as required by the provisions of the Municipal Act. We might point out that a part of the order made by the learned Judge is in any event unsustainable because he has issued an order upon the Municipality to invite fresh and proper tenders for this particular work. Now, it is open to the Standing Committee under S. 72 (3) to dispense with the inviting of tenders, and, therefore, even if this particular contract was invalid, the only order that could have been made was to restrain the Municipality from executing this particular contract. As to how they should enter into a fresh contract is a matter entirely within the discretion of the Standing Committee. But as we have come to the conclusion that on the merits the petitioner is not entitled to succeed and that the contract which the Municipality intends to enter into with the Hindustan Construction Co., Ltd., is a valid contract, the order made by the learned Judge cannot stand.

[15] We, therefore, allow the appeal, set aside the order made by the learned Judge and dismiss the petition. As some time was taken up both in the Court below and before us on the question of the maintainability of the petition and as the petitioner has succeeded on that preliminary point, we think the fairest order to make with regard to the costs would be that the petitioner should pay to the respondents

three-fourths of the costs of the petition below and three fourths of the costs of this appeal. As the matter was of considerable importance we allow on taxation two counsel in this appeal.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Bombay 242 [C. N. 64.]

RAJADHYAKSHA AND JAHAGIRDAR JJ.

Bai Faiba and another — Defendants — Appellants v. Chudasma Jorubha Gajubha and others — Plaintiffs — Respondents.

First Appeal No. 250 of 1943, Decided on 14th November 1947, from order of Civil Judge (Senior Division), Ahmedabad, in Suit No. 893 of 1937.

(a) Hindu Law—Adoption—Adoption by Hindu widow after death of sole surviving coparcener — Effect is to displace title based on inheritance from coparcener.

The coparcenary in a joint family does not come to an end on the death of the sole surviving coparcener and the adoption by a widow of a gotraja sapinda, so long as such widow is a member of the joint family of which the deceased was the sole surviving coparcener, can bring into the joint family a new member in whom the property vests immediately on adoption as it would have vested if he had been a member of the joint family when the sole surviving coparcener died. The adoption by the widow, of a gotraja sapinda, whose husband was a member of the joint family, after the death of the sole surviving coparcener, displaces any title based merely on inheritance from such coparcener: A. I. R. (24) 1937 Bom. 279 (F.B.) *held overruled* and A. I. R. (25) 1938 Bom. 383 (F.B.); A. I. R. (28) 1941 Bom. 323 and A. I. R. (29) 1942 Bom. 280 *impliedly overruled* by A.I.R. (30) 1943 P.C. 196; S. A. No. 1013 of 1942, *Disting.* [Paras 8 and 10]

(b) Hindu Law—Widow—Surrender—Surrender brought about as result of widow's leaving matter to arbitration—Widow giving up only her right to adopt but retaining complete management during her life-time — Surrender not effective.

The surrender by a Hindu widow must be voluntary and not brought about as a result of the widow's leaving the matter to arbitration. It must be a bona fide and total surrender of all interests of the widow in favour of the nearest reversioners. Where the widow gives up only her right to adopt but retains complete management of the whole property during her life-time the surrender is not effective. [Para 11]

J. C. Shah and N. C. Shah — for Appellants.

R. J. Thakor and K. T. Pathak — for Respondents.

Rajadhyaksha J. — This appeal from the judgment and decree of the Court of the First Class Subordinate Judge, Ahmedabad, in Civil Suit No. 893 of 1937 raises, on the findings made by the lower Court and submissions made to us, an important question of law. The dispute related to an undivided one-anna share in the talukdari estate of the village of Kharad in Dhandbuka taluka of the Ahmedabad District. The relationship of the parties to the suit is shown by the genealogy in the judgment of the lower Court. The ancestor of the parties was one Akhabhai who died leaving two sons, Abhesang and Dehabhai. Although the matter was in dispute before the trial Court, it is now conceded, as

found by the learned trial Judge, that Abhesang and Dehabhai were divided and that the property in suit came to the share of Dehabhai. Dehabhai had a son, Dajibhai. Dajibhai died leaving two sons, Ramabhai and Balubhai. In the trial Court a question arose whether Ramabhai and Balubhai were joint or divided. It has been found by the learned trial Judge that they were joint, and this finding is not disputed before us. Balubhai died in 1902 leaving his widow Bai Faiba, defendant 1. Ramabhai had a son, Vakhatsing, who died in 1913 leaving a son Anupsing who died in 1919 during his minority. Thus so far as Dehabhai's branch is concerned, Anupsing was the sole surviving coparcener. On Anupsing's death the property vested in defendant 1 as the widow of a *gotraja sapinda* succeeding to the estate of Anupsing, the sole surviving coparcener. In 1931 Bai Faiba, defendant 1, adopted defendant 2. Thereupon the plaintiffs who are the representatives of the branch of Abhesang filed the present suit for a declaration that defendant 1 had no right to adopt and that the adoption of defendant 2 by her was not valid and lawful. They also asked for a declaration that defendant 2 did not acquire any rights over the properties as a result of his adoption. In support of this contention, the plaintiffs relied not only upon the law on the subject but also based their case on an agreement, Ex. 69, dated 9th December 1920, passed by defendant 1 to plaintiffs 3 and 4. The plaintiffs alleged that by Ex. 69 she surrendered her right of adoption.

[2] The defendants resisted the suit on the ground that the deed dated 9th December 1920, was obtained by the plaintiffs by means of fraud and misrepresentation, was opposed to public policy, and was void for absence of consideration. It was contended that there was a partition between Ramabhai and Balubhai, that Ramabhai's property had come by way of inheritance to Anupsing and that on Anupsing's death defendant 1 had succeeded to the estate. It was asserted that she had every right to adopt in spite of the document Ex. 69 and that the adoption had in fact taken place. The adoption, it was contended, was legal and valid, conferred title to the property on defendant 2, and that, therefore, the plaintiffs' suit should be dismissed with costs.

[3] The learned Judge disbelieved the defence contention that the document was obtained by fraud and misrepresentation but held that it was not binding on the defendant as it was opposed to public policy and was void for absence of consideration. He also rejected the defence contention that Ramabhai and Balubhai were divided and held that they formed a joint Hindu

family. On this view he held that Anupsing was the full owner of the property as the sole surviving coparcener and that on his death defendant 1 was entitled to the properties, although she obtained only a widow's estate over them. He found that the adoption of defendant 2 by defendant 1 was proved and valid. But relying on the decision of the Full Bench of this Court in *Balu Sakharam v. Lahoo*, 39 Bom. L. R. 382: (A.I.R. (24) 1937 Bom. 279 F.B.), he held that by reason of the adoption defendant 2 did not obtain any interest in the property. He accordingly declared (1) that defendant 1 had a right to take defendant 2 in adoption, (2) that the adoption of defendant 2 by defendant 1 was proper and legal, and (3) that defendant 2 did not acquire any rights over the suit properties as a result of his adoption. He directed that the parties should bear their own costs in the circumstances of the case. It is against this order that the defendants have come in appeal.

[4] In the appeal before us the respondents-plaintiffs have filed no cross-objections with respect to the first two declarations given by the lower Court, although the findings were against the stand taken by the plaintiffs. The appeal must, therefore, proceed on the basis of the correctness of those findings. The only grievance that the appellants, therefore, make is that in view of those findings, it should have been held that defendant 2 obtained an interest in the properties by reason of the adoption and that the third declaration that the plaintiffs had asked for should also not have been given. In other words, the question that arises in this appeal is this: although defendant 1 has a right to adopt and had legally and validly adopted defendant 2, whether such an adoption does or does not confer upon defendant 2 the right to the suit properties.

[5] The lower Court has dealt with the matter as follows:

"As there was no partition between Balubhai and Vakhatsing, Vakhatsing alone as member of a joint family with Balubhai got whole estate in 1902. Anopsing, however, died in 1919 unmarried at the age of 15 and the whole estate came to defendant 1 as the only widow of a coparcener alive in that year. The plaintiffs say that they are entitled to get this estate as reversioners of Anopsing subject to the life estate of defendant 1 and the defendants allege that defendant 1 was entitled to inherit the estate of Anopsing on his death as a widow of a coparcener. The adoption of defendant 2 took place after the termination of the coparcenary on the death of Anopsing in 1919 and so it had not the effect of reviving the coparcenary and defendant 2 does not get any interest in the property which was once enjoyed by Balubhai and Vakhatsing and which is now in the management of defendant 1 as a widow of a coparcener after the death of Anopsing (*vide* the case of *Balu Sakharam v. Lahoo*, 39 Bom. L. R. 382: (A. I. R. (24) 1937 Bom. 279 F. B.), followed in the case of *Rudrappa Yellappa Sattennabar v. Mallappa Malleshappa*, 41

Bom. L. R. 1277: (A. I. R. (27) 1940 Bom. 95). The adoption by the widow of a coparcener who was not the last male holder is regarded valid by the above mentioned decisions but such an adoption does not divest the property."

The Full Bench decision of *Balu Sakharam v. Lahoo*, (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F.B.) has since been overruled by the Privy Council in *Anant Bhikappa Patil v. Shankar Ramchandra Patil*, 46 Bom. L. R. 1: (A. I. R. (30) 1943 P. C. 196) and the question, therefore, arises whether as a result of this Privy Council decision, the view taken by the lower Court, based as it was on *Balu Sakharam v. Lahoo*, (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F. B.) is correct or not.

[6] The genealogy in the case of *Balu Sakharam v. Lahoo*, (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F. B.) is given at page 384 of the report. The joint family there consisted of Balu and his three sons, Babaji, Laxman and Vithal. As a result of the various deaths in the family the last male member was Shiva who died in the year 1919 leaving three widows in the joint family: Tayaji, Bayaji and Gauri. Four years later, i. e. in 1923, Bayaji adopted Balu, defendant 1, and in May 1930 he took possession of the property. In August 1930 Lahoo the plaintiff filed a suit to recover possession of the property. His case was that after the death of Shiva, the last surviving coparcener, the family property was inherited by Shiva's widow, Gauri, that as she had remarried, the property had devolved on Shiva's sister Audi, and that as he was a purchaser from Audi, he was entitled to the possession of the property. The suit was resisted by defendant 1, Balu, his contention being that as he was adopted by Bayaji before Gauri's remarriage, he became the only coparcener in the family and as such was entitled to the property and that Audi had no title to convey the property to the plaintiff. The suit was ultimately decided by a Full Bench of this Court. The majority view of Beaumont C. J. and N. J. Wadia J. was expressed in the judgment delivered by the Chief Justice, Rangnekar J. dissenting. The majority held that:

"Where a Hindu coparcenary had come to an end on the death of the last surviving coparcener, and the family property had vested in his heir, a subsequent adoption by the widow of a predeceased coparcener was valid."

According to the learned Judges this was a necessary implication of the Privy Council decisions in *Pratapsing Shivsing v. Agarsingji Raisingji*, 46 I. A. 97: (A. I. R. (5) 1918 P. C. 192), *Yadao v. Namdeo*, 48 I. A. 513: (A. I. R. (9) 1922 P. C. 216), *Bhimabai v. Gurunathgouda Khandappagouda*, 60 I. A. 25: (A. I. R. (20) 1933 P. C. 1), *Amarendra Mansingh v. Sanatan Sing*, 60 I. A. 242: (A. I. R. (20) 1933 P. C. 155)

and *Vijaysingji Chhatrasingji v. Shivsangji Bhimasangji*, 62 I. A. 161: (A. I. R. (22) 1935 P. C. 95). But they held that such an adoption does not revive the coparcenary and does not vest the coparcenary property in the adopted son to the exclusion of the heir of the last holder other than the widow herself. In giving the decision, the majority of the Judges formulated the following propositions:

(1) A widow of a deceased member of a Hindu joint family can adopt to her husband without obtaining the consent of her husband's relations.

(2) A Hindu widow's right to adopt is based on religious considerations, and is not affected by any considerations as to the vesting or divesting of property.

(3) Where a coparcenary exists at the date of the adoption, the adopted son becomes a member of the coparcenary, and takes his share in the joint property accordingly. This principle applies although the coparcenary is a zamindari having the peculiar feature of being governed by the rule of primogeniture.

(4) Where the adoption takes place after the termination of the coparcenary by the death, actually or fictionally, of the last surviving coparcener, the adoption by a widow of a predeceased coparcener has not the effect of reviving the coparcenary, and does not divest property from the heir of the last surviving coparcener (other than the widow) or those claiming through him or her.

The minority view of Rangnekar J. was (p. 443):

"Where the coparcenary is extinct and the estate of the last surviving coparcener has passed by inheritance to his heir, the power of a widow of a predeceased coparcener to adopt a son to her husband is at an end and she cannot make a valid adoption to her deceased husband . . . (But) if the adoption was valid, it was valid for all purposes, and the adopted son had all the rights of a posthumous son."

The principles so enunciated came up for consideration of the Privy Council in *Anant v. Shankar* (46 Bom. L. R. 1: A. I. R. (30) 1943 P. C. 196). The genealogy in that case is given at page 41 of the report. Dhulappa had two sons Punappa and Hanamantappa who were divided long time ago. In the branch of Punappa the last surviving coparcener was Keshav who died in 1917. On his death, his nearest heir was the defendant Shankar who belonged to the branch of Hanamantappa. He obtained possession of the properties from the Collector in 1928. In 1930 Keshav's mother Gangabai adopted the plaintiff Anant and in 1932 the plaintiff by his next friend filed a suit for recovering possession of the properties from defendant Shankar. Following the decision in *Balu Sakharam v. Lahoo* (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F.B.), the Division Bench of this Court held that the coparcenary had come to an end on the death of Keshav and that the subsequent adoption by the widow in the joint family although valid did not have the effect of reviving the coparcenary and did not divest the property from Shankar who was the heir to the last surviving coparcener.

The plaintiff's suit was accordingly dismissed. The matter was then taken in appeal before the Privy Council. Upon the initial question of the validity of the plaintiff's adoption, their Lordships approved the view of the majority of the Full Bench in *Balu Sakharam v. Lahoo* (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F.B.) and rejected the view taken by Rangnekar J. They did not accept the view that Gangabai's power to adopt came to an end on the death of her son Keshav by reason of the fact that she was the sole surviving coparcener in the joint family. As regards the effect of the adoption on the devolution of the property, their Lordships observed as follows (p. 8):

"Her (Gangabai's) power to adopt could not have been exercised in his lifetime, and if exercised after his death, cannot, as their Lordships think, be given any less effect than would have attached to an adoption made after his death by the widow of a predeceased collateral. It must vest the family property in the adopted son on the same principle, displacing any title based merely on inheritance from the last surviving coparcener."

In coming to this conclusion, their Lordships observed as follows (p. 7):

"If then the plaintiff's adoption was valid, can it be held that it does not take effect upon the property which had belonged to the joint family because there was no coparcenary in existence at the date of the adoption? On this point their Lordships, differing from the majority decision in *Balu Sakharam's case*: (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F.B.) (*supra*), held that the adoption being valid cannot be refused effect. That the property had vested in the meantime in the heir of Keshav is not of itself a reason, on the principles laid down in *Amarendra's case*: (60 I. A. 242: A. I. R. (20) 1933 P. C. 155), why it should not divest and pass to the plaintiff. Keshav's right to deal with the family property as his own would not be impaired by the mere possibility of an adoption . . . But in his lifetime adoption by the widow of a collateral coparcener would have divested him of part of his interest and the same right to adopt subsisting after his death must, in their Lordships' view, have qualified the interest which would pass by inheritance from him. As *Appovier v. Rama Subba Aiyar*, 11 M. I. A. 75: (2 Sar 218 P. C.), made clear, the fraction which is at any time employed to describe the quantum of the interest of a male member of the family does not represent his rights while the family is joint, but the share which he would take if a partition were then to be made. His interest is never static but increases by survivorship as others die and lessens as others enter the family by birth or adoption. What principle requires that the death of the last surviving coparcener should present any further fluctuation of the interest to which he was entitled notwithstanding that a new member has since then entered the family by adoption?"

Their Lordships quoted with approval the observations of the Nagpur High Court in *Bajirao v. Ramkrishna*, I. L. R. (1941) Nag. 707 (p. 718): (A. I. R. (29) 1942 Nag. 19):

"We regard it as clear that a Hindu family cannot be finally brought to an end while it is possible in nature or law to add a male member to it. The family cannot be at an end while there is still a potential

mother if that mother in the way of nature or in the way of law brings in a new male member."

In view of this pronouncement the conclusion arrived at by the learned Judge, based as it is on the dictum in *Balu Sakharam v. Lahoo* (39 Bom. L. R. 382 : A. I. R. (24) 1937 Bom. 279 F. B.), that the adoption though valid, does not give to the adopted son any interest in the property, must be held to be incorrect. If these principles had been applied in *Balu Sakharam v. Lahoo* (39 Bom. L. R. 382 : A. I. R. (24) 1937 Bom. 279 F. B.), Balu's adoption by Bayaji would have resulted in his obtaining full interest in the property of the joint family and the plaintiff would have been non-suited. In the present case also defendant 2's adoption by defendant 1 would give him immediate interest in the property and divest defendant 1, and the plaintiffs' prayer for a declaration that defendant 2 acquired no right over the suit properties must be rejected.

[7] Although the trial Court did not rely upon it, a case almost exactly on all fours with the case that we have to decide was considered by a Full Bench of this Court in *Krishnaji Raghunath v. Rajaram Trimbak*, I. L. R. (1938) Bom. 679 : (A. I. R. (25) 1938 Bom. 383 F. B.). The genealogy in the case is given at page 680 of the report. The branches of Keshav, Hari and Rajaram the plaintiffs were divided. In the branch of Keshav the last surviving coparcener was the infant son of Dhondiram. On the death of the infant son in 1900, the property passed to his mother Laxmibai. On Laxmibai's death in 1901 the property passed to his grand-mother Bhagirathibai, and on Bhagirathibai's death, to his paternal aunt, Radhabhai (defendant 1). Radhabhai — who was a widow in the joint Hindu family — then adopted defendant 2 and thereupon Rajaram a representative of another branch sued for a declaration that the adoption of defendant 2 by defendant 1 was illegal and void and that defendant 2 obtained no title to the property by virtue of the adoption. This case is exactly like the present one where on the death of the last sole surviving coparcener Anup Singh, the property vested in the widow of a collateral who succeeded to him as a *gotraja sapinda* and thereupon adopted a son i. e., defendant 2, to her husband. As in the case of *Krishnaji Raghunath v. Rajaram Trimbak*, (I. L. R. (1938) Bom. 679 : A. I. R. (25) 1938 Bom. 383 F. B.), in the present case also the adoption is challenged by a representative of some other branch in the family and the same declarations as were asked for in *Krishnaji Raghunath v. Rajaram Trimbak*, I. L. R. (1938) Bom. 679 : (A. I. R. (25) 1938 Bom. 383 F. B.), are being asked for here. If therefore *Krishnaji Raghunath v. Rajaram Trimbak*, I. L. R. (1938)

Bom. 679 : (A. I. R. (25) 1938 Bom. 383 F. B.), is still good law, the decision in the present case must be governed by the decision in that case. The Full Bench of this Court held that:

"under Hindu law, a widow of a *gotraja sapinda*, who succeeds under the rule established by *Lalloobhoy Bappobhoy v. Cassibai*, 7 I. A. 212 : (5 Bom. 110 P. C.), cannot by adoption alter, after her own death, the devolution of property to which she is entitled as such widow."

It was further held that

"on the death of the last coparcener in a joint Hindu family, the widow of his paternal uncle succeeded to the family property as the widow of a *gotraja sapinda*, and the adoption though valid had no effect on the devolution of the property as against the plaintiff."

In coming to this decision the Full Bench purported to follow the case in *Balu Sakharam v. Lahoo*, 39 Bom. L. R. 382 : (A. I. R. (24) 1937 Bom. 279 F. B.), and Beaumont C. J. at p. 690 of the report observed as follows :

"... it was held (in that case) that an adoption by a widow, where the coparcenary is at an end, does not operate to divest property vested in or through the heir of the last holder. So long as that decision stands it must be taken as settled that in this presidency you may have an adoption by a widow which is valid, but which does not place the adopted son in the same position in regard to property as a natural born son would have been in."

It was on this footing that the case was discussed and the Full Bench came to the conclusion that the adoption of defendant 2 was valid but did not affect the devolution of the property inherited by defendant 1 as the widow of a *gotraja sapinda* as against the plaintiff.

[8] In view of the Privy Council decision in *Anant v. Shankar*, 46 Bom. L. R. 1 : (A. I. R. (30) 1943 P. C. 196), we think that the decision in *Krishnaji Raghunath v. Rajaram Trimbak*, I. L. R. (1938) Bom. 679 : (A. I. R. (25) 1938 Bom. 383 F. B.), cannot any longer be held to be good law. It is true as stated by Broomfield J. in that case (p. 695) :

"There is a strong current of authority in this Presidency to the effect that the widow of a *gotraja sapinda* cannot adopt so as to defeat the rights of the reversioners. The authority of these cases should not be disturbed unless it is necessary to do so."

But in our opinion the case of a widow of a *gotraja sapinda* who belongs to the same joint family stands on a different footing than the case of any other widow of a *gotraja sapinda*. Both in the case of *Krishnaji Raghunath v. Rajaram Trimbak*, (I. L. R. (1938) Bom. 679 : A. I. R. (25) 1938 Bom. 383 F. B.), and in *Anant v. Shankar*, (46 Bom. L. R. 1 : A. I. R. (30) 1943 P. C. 196), the adopting widow was a widow of a *gotraja sapinda* and the person who laid claim to the property was a representative of a different branch. In *Krishnaji Raghunath v. Rajaram*, (I. L. R. 1938 Bom. 679 : A. I. R. (25) 1938 Bom. 383 F. B.), he was a

plaintiff and asked for a declaration that the adopted son obtained no title to the property by virtue of the adoption. In *Anant v. Shankar* (46 Bom. L. R. 1: A. I. R. (30) 1943 P. C. 196), he was a defendant from whose possession the property was sought to be recovered by the adopted son. Even according to *Balu Sakharan v. Lahoo* (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F.B.), the adoption was good. But so far as its effects are concerned, the following observations of their Lordships of the Privy Council in *Anant v. Shankar* (46 Bom. L. R. 1: A. I. R. (30) 1943 P. C. 196), apply exactly to the case of *Krishnaji Raghunath v. Rajaram Trimbak* (I. L. R. (1938) Bom. 679: A. I. R. (25) 1938 Bom. 383 F.B.) (p. 8):

"Taking first the simpler case where the adoption has been made by the widow of predeceased collateral of the last surviving coparcener, their Lordships find it difficult upon the foregoing principles to discover in the death of the latter before the adoption any ground for denying that the interest of the adoptive father or any part of it passes to the adopted son."

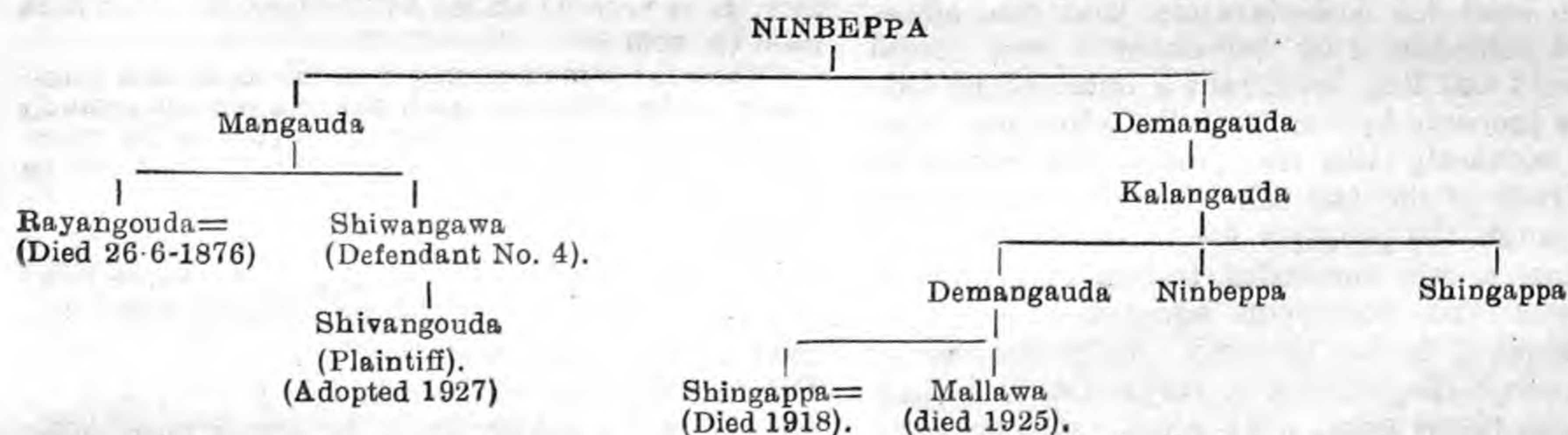
The principle on which their Lordships proceeded was that a joint Hindu family does not come to an end while there is still in that family a potential mother, if that mother in the way of nature or in the way of law brings in a new male member. The view adopted in *Balu Sakharan v. Lahoo*, (39 Bom. L. R. 382: A. I. R. (24) 1937 Bom. 279 F.B.) that the coparcenary in a joint family comes to an end on the death of the sole surviving coparcener is no longer good law, and the adoption by a widow of a *gotraja sapinda*, so long as such widow is a member of the joint family of which the deceased was the sole surviving coparcener, can bring into the joint family a new member in whom the property vests immediately on adoption as it would have vested if he had been a member of

the joint family when the sole surviving coparcener died. The observations of their Lordships of the Privy Council that

"the power of the mother of a sole surviving coparcener exercised after his death, cannot be given any less effect than would have attached to an adoption made after his death by the widow of a predeceased collateral"

emphasise the same point. It must vest the family property in the adopted son on the same principle, displacing any title based merely on inheritance from the last surviving coparcener. It must, therefore, be held that the adoption by the widow of a predeceased collateral in whom property has vested as a widow of a *gotraja sapinda* and whose husband was a member of the joint family, has the effect of divesting the property and displacing any title based merely on inheritance from the last surviving coparcener. To that extent it must be held that *Krishnaji Raghunath v. Rajaram Trimbak*, (I. L. R. (1938) Bom. 679: A. I. R. (25) 1938 Bom. 383 F.B.) has been impliedly overruled by *Anant Bhikappa Patil v. Shankar Ramchandra Patil*, 46 Bom. L. R. 1: (A. I. R. (30) 1943 P. C. 196) and is no longer good law. The same conclusion applies to the cases of *Subrao Baji v. Dada Bhiwa*, 43 Bom. L. R. 492: (A. I. R. (28) 1941 Bom. 323) and *Madhavsang Haribhai v. Dipsang Jijibhai* 44 Bom. L. R. 661: (A. I. R. (29) 1942 Bom. 280), both of which were decided on the authority of *Krishnaji Raghunath v. Rajaram Trimbak*, (I. L. R. (1938) Bom. 679: A. I. R. (25) 1938 Bom. 383 F.B.).

[9] Our attention has been invited to a decision of this Court in *Sivangauda Rajangauda Patil v. Rudragauda Ningangauda Patil*, S. A. No. 1013 of 1942 decided by Macklin and Rajadhyaksha JJ. on 6th April 1945, to which I was a party. The genealogy in that case was as follows:



Ninbeppa had two sons Mangauda and Demangauda. These two brothers were divided, and we were concerned in that appeal with the property of the joint family consisting of Demangauda and his son and grandsons. The sole surviving coparcener was one Shingappa who died in 1918. On his death the property went to his widow Mallawa and on her death in 1925 the property

went to Shivangawa the widow of Rayangauda defendant 4. Defendant 4 adopted the plaintiff in 1927 and he filed a suit to recover certain properties against persons who were found, as a fact, to be mere trespassers in possession of the estate, though they claimed to be reversioners after the death of Mallawa. It was held in that case that the Privy Council case of *Anant v.*

Shankar (46 Bom. L. R. 1: A. I. R. (30) 1943 P. C. 196), had no application and that even though the adoption was made by the widow of a *gotraja sapinda*, it did not divest the property of the adoptive mother. That case is obviously very different from the one which we have to consider. There the widow who succeeded to the last male holder as the widow of a *gotraja sapinda*, was not a member of the joint family of Demangauda and could not, therefore, introduce a new member into that joint family by making the adoption of the plaintiff. The whole decision of *Anant v. Shankar* (46 Bom. L. R. 1: A. I. R. (30) 1943 P. C. 196), proceeds on the footing, as I have stated in an earlier part of the judgment, that where the widow of a collateral brings, by means of an adoption, a new member into the joint family, such an adoption has the effect of divesting the estate inherited from the last male holder. In *Anant v. Shankar* (46 Bom. L. R. 1: A. I. R. (30) 1943 P. C. 196) itself, this distinction has been made out, for at page 9 their Lordships observe:

"Neither the present case nor *Amarendra's case* (60 I. A. 242: A. I. R. (20) 1933 P. C. 155), brings into question the rule of law considered in *Bhubaneswari Debi v. Nilkomul Lahiri*, 12 I. A. 137 at p. 141: (12 Cal. 18 P. C.) and stated by the Board to be that 'according to the law as laid down in the decided cases, an adoption after the death of a collateral does not entitle the adopted son to come in as heir of the collateral'."

In *Bhubaneswari Debi's case* (12 I. A. 137: 12 Cal. 15 P. C.), the family consisted of three brothers Rammohun, Shibnath and Kalimohun who were all divided, and the question related to the separate property of Rammohun. After the death of Rammohun the property was inherited by his widow Chandmoni who died in 1867. Before Chandmoni's death, Kalimohun had adopted a son Nilkomul. But Shibnath had died leaving only a widow Bhubaneswari. On Chandmoni's death the property went to Nilkomul. Later on Bhubaneswari adopted a son Jotindra. Jotindra on adoption filed a suit claiming half share in the property of Rammohun, and it was held by their Lordships of the Privy Council that "an adoption after the death of a collateral does not entitle an adopted son to come in as an heir to the collateral." This case was very different from the case with which we have to deal. The adoption of the plaintiff in *Bhubaneswari Debi's case* (12 I. A. 137: 12 Cal. 18 P. C.), did not bring into the joint family a new member, and it was held that "the plaintiff's adoption did not entitle him to come in as an heir of Rammohun after the property had already vested in Nilkomul as the legitimate heir on the death of Chandmoni." Following this principle, we held in *Sivangauda's case* (S. A. No. 1013 of 1942, decided on 6th

April 1945), that the plaintiff's adoption did not entitle him to come in as heir after the property of Shingappa had already vested in his heir, who was defendant 4.

[10] We are, therefore, of opinion, on the authorities as they stand at present, that the adoption by the widow of a *gotraja sapinda* whose husband was a member of the joint family, after the death of the sole surviving coparcener, displaces any title based merely on inheritance from such coparcener. In the present case, the adoption by Bai Faiba whose husband was a member of the joint family, though made by a widow of a *gotraja sapinda* in whom the property has vested as an heir confers on the adopted son the right to the property which was held by the sole surviving coparcener, Anupsing. The plaintiff, therefore, is not entitled even to the third declaration which was given to him by the lower Court. That being the case, in our opinion, the appeal succeeds and the plaintiffs' suit must be dismissed with costs in this Court. The order of costs in the lower Court will stand.

[11] One further point was argued by Mr. R. J. Thakor for the respondents. It was contended that the adoption of defendant 2 was bad as it was an adoption made after the property had been surrendered by her under Ex. 69. The lower Court has already held that the document was opposed to public policy and void for absence of consideration. Nothing was urged by Mr. Thakor against these conclusions of the lower Court, and if the document is bad for these reasons, it cannot be relied upon for suggesting that defendant 1 had surrendered her property. But even assuming that the document is not bad, it does not, in our opinion, amount to a surrender. Mr. Thakor frankly conceded that if the document was *inter partes* between the plaintiff and defendant 1, it would not amount to a surrender because the only right which the widow had given up under the document was the right to adopt. She retained complete management of the whole property during her lifetime. The learned counsel, however, argued that because the document embodied the decisions of arbitrators who might have given nothing to defendant 1, it should be regarded as a surrender. In our opinion, there is no substance in this contention. The surrender must be voluntary and not brought about as a result of the widow's leaving the matter to arbitrator. It must be *bona fide* and total surrender of all the interests of the widow in favour of the nearest reversioners. It must be a voluntary act to efface herself from the succession as effectively as if she had then died. (See *Bhagwat Koer v. Dhanukhdhari Prashad Singh*, 46 I. A. 259: (A. I. R. (6) 1919 P. C. 75). Judged by these criteria, it seems to us

obvious that the document does not amount to a surrender and cannot have the effect which follows from a surrender.

[12] In the result, therefore, in our opinion, the appeal succeeds and the plaintiffs' suit must, as we have stated before, be dismissed with costs in this Court. The order regarding costs in the lower Court will stand.

D.H.

Appeal allowed.

A. I. R. (36) 1949 Bombay 248 [C. N. 65.]

BAVDEKAR AND DIXIT JJ.

Vishnu Vishwanath Paranjpe—Plaintiff—Appellant v. The Government of Bombay—Defendant—Respondent.

Second Appeal No. 94 of 1945, Decided on 12th July 1948, from order of Dist. Judge, Nasik, in Appeal No. 249 of 1942.

(a) Bombay Exemptions from Land-revenue (No. 1) Act (II [2] of 1863), S. 16 (G) — Inam village held jointly by joint Hindu family — Partition effected — Members allotted specific shares — It does not amount to 'transfer' within meaning of S. 16 (G).

Where a person holds a village in inam as a joint family property on behalf of himself and his two brothers who constitute the joint family, the revenue is a joint family property and belongs to all of them. When subsequently a partition is effected between them, the effect is that what was previously owned and enjoyed in common is replaced by separate enjoyment of specific shares in the joint property owned separately. In such a case though there is a transfer, it is not a transfer within the meaning of S. 16, Cl. (G). To hold so would mean that what was conveyed was something to which the brothers were not entitled: A. I. R. (23) 1936 Bom. 10, *Disting.* [Paras 8 & 10]

(b) Bombay Exemptions from Land-revenue (No. 1) Act (II [2] of 1863), S. 5 (3) — It is a taxing provision and must be construed in favour of subject. [Para 11]

*T. N. Walavalkar—*for Appellant.

B. G. Thakor, Addl. Asst. Govt. Pleader

— for Respondent.

Dixit J.— This second appeal raises a question under Bombay Act II [2] of 1863, and the facts necessary to understand the question are these:

[2] Plaintiff Vishwanath and his two brothers Keshav and Krishnaji were members of a joint Hindu family. These three brothers were possessed of considerable property consisting of houses, lands and a grocery shop. They had also an interest in a *jahagir* village called Vadner and that interest was that they were to receive a sum of Rs. 1,555-5-4 out of the revenues of the village. It appears that in 1936 there was a dispute between them about the division of the ancestral and jointly acquired properties and the dispute was referred to arbitration. The arbitrator made an award and an award decree was passed on 25th October 1937. That decree was registered on 3rd January 1938. It appears that

the award decree was to some extent modified by a compromise between the parties in Suit No. 210 of 1936. After the award decree the two brothers Keshav and Krishnaji made an application to have their names entered in the revenue records and their names were accordingly entered. From that order plaintiff Vishwanath preferred an appeal to the Commissioner, Central Division, and on 17th September 1938, he made an order imposing upon the plaintiff a penalty equal to the amount of the *nazrana* of both the brothers for his failure to inform the Government of what was said to be a transfer, as required by S. 5, cl. (3) of the Act. The plaintiff preferred an appeal to the Revenue Tribunal, but his appeal was unsuccessful.

[3] The plaintiff, therefore, filed the present suit against the Province of Bombay alleging that the order made by the Commissioner on 17th September 1938, was illegal, unjust and *ultra vires*. He also asked for refund of part of the amount of the penalty already paid by him and for an injunction restraining the defendant from recovering the remaining amount of penalty from him. The Province of Bombay filed a written statement, contending, *inter alia*, that there was a transfer in favour of the plaintiff's brothers within the meaning of Bombay Act II [2] of 1863, that the plaintiff failed to give notice as required by S. 5, cl. (3) of the Act, and that the Commissioner was competent to make the order.

[4] Both the Courts have taken the view that there was a transfer within the meaning of the Act and that the Commissioner's order was, therefore, legal. In accordance with that view the plaintiff's suit has been dismissed. It is from the decision of the appellate Court that the plaintiff has preferred the present appeal.

[5] Upon this appeal it is contended that the lower Courts were wrong in holding that there was in this case a transfer within the meaning of S. 16, cl. (G) of Bombay Act II [2] of 1863. In order to understand this contention it is necessary to set forth the material part of the consent decree. It is as follows:

"The whole village of Mouje Vadner Dumala, taluka Nasik is a *jahagir* village and therein that is to say in the amount of Rs. 2,460, a share of Rs. 1,555-5-4 belongs to the parties, *viz.*, the three brothers, the same being made up of Rs. 1,463-5-4 and Rs. 92 under the mortgage in possession. Out of Rs. 1,555-5-4 which the said village would yield to them as *vasul* Rs. 92 in respect of the *jahagir* under mortgage should be independently taken by Vishvanath. Plaintiff and defendant 2 have no right over the same. The balance of the amount should be equally distributed by the three brothers Vishvanath Ganesh, Keshav Ganesh and Krishnaji Ganesh amongst themselves and arrangements should be made by Vishvanath Ganesh by ordering the village Patil talathi to pay Keshav Ganesh and Krishnaji Ganesh their respective shares by separate (*Potebandi*)."

This part of the decree has been construed to mean an alienation within the meaning of S. 16 cl. (G) of Bombay Act II [2] of 1863. Section 16, cl. (G), runs as follows :

"The word 'transfer' shall, for the purposes of this Act, be taken to mean the permanent alienation of land by assignment, gift, sale, deed or other instrument or otherwise howsoever, and also mortgage of the same under which possession shall have passed or is to pass to the mortgagee."

[6] Now, the provisions under which the plaintiff was required to give notice of the transfer are contained in S. 5, cl. (3), which is as follows:

"It shall also be the duty of the holder of any land made subject under this section to the payment of occasional *nazrana* instead of to an annual *nazrana* of one anna in each rupee of the assessment, who shall transfer the same or any part thereof to give to the Collector or Chief Revenue Officer of the District in which the lands so transferred are situate, notice in writing of such transfer, and of the nature and extent thereof, and of the person or persons to whom the same is made, within one month after such transfer has been made; and, in default of such notice, the person or persons so transferring as aforesaid shall forfeit a sum equal to the amount of the *nazrana* leviable on the occasion from the person to whom the transfer shall have been made."

[7] In the present case the three brothers did not hold the lands as such. But that is immaterial because S. 16, cl. (B), provides:

"The word 'lands' shall for the purposes of this Act be understood to include villages, portions of villages, shares of the revenues thereof, and landed estate of every description."

[8] It is manifest from what has been mentioned above that the three brothers were entitled to the sum of Rs. 1,555-5-4 which was the amount of the revenue of the village. It is clear, therefore, that so far as the sum of Rs. 1,555-5-4 is concerned it was the joint property of the three brothers. Now, partition of joint property, according to Mitakshara law, consists in defining the shares of the coparceners in the joint property. In this case the three brothers held the village of Vadner in *inam* and the share in the revenue of Rs. 1,555-5-4 belonged to them all. This was before the partition. The effect of partition was that what was previously owned and enjoyed in common was replaced by separate enjoyment of specific shares in the joint property owned separately.

[9] On behalf of the Province of Bombay it is argued, relying upon the case in *Waman v. Ganpat*, 37 Bom. L. R. 925: A. I. R. (23) 1936 Bom 10, that there was in this case a transfer and so Vishwanath was bound to give notice as required by S. 5, cl. (3) of the Act. It is true that it has been held in the above-mentioned case that a partition by metes and bounds among the co-owners of immovable property amounts to a 'transfer' within the meaning of that term in S. 53, T. P. Act. But we are concerned in

this case with the definition of the expression "transfer" as occurring in S. 16, cl. (G), of Bombay Act II [2] of 1863. The expression "alienation", according to Stroud's Judicial Dictionary, Vol I, p. 65, means "to make a thing another man's." It will appear from page 143 of Words and Phrases Judicially Defined by Roland and Burrows that alienation implies a transaction by which property is given to another person. In Wharton's Law Lexicon, 14th Edn., p. 1006, "transfer" means "to convey; to make over to another."

[10] Question, therefore, arises as to whether in this case there was a transfer within the meaning of S. 16, cl. (G) of the Act. It is arguable that in this case what was previously enjoyed in common was replaced by separate enjoyment of specific portions of the joint property and to that extent it is possible to contend that there was a transfer. But to accept the construction contended for on behalf of the Province of Bombay that there was a transfer within the meaning of S. 16, cl. (G), is to hold that the two brothers were conveyed something to which they were not previously entitled. But that is an impossible construction. The two brothers to whom specific portions in the share of the revenue were given were entitled before the partition to the whole of the amount of the revenue as joint property. It cannot be said, therefore, that something was conveyed to the two brothers to which they were not previously entitled. Upon that construction we think that the construction urged on behalf of the Province of Bombay cannot be accepted.

[11] There is also another way of looking at the matter. In so far as S. 5, cl. (3), enables Government to impose a penalty for failure to give notice of a transfer, the Act is obviously a taxing statute. According to cl. (3), an occasional *nazarana* has to be levied and it is leviable from the person to whom the transfer is made. Therefore, in case of a transfer what happens is that Government is in the first instance entitled to receive occasional *nazarana* from the transferees and also to receive a penalty from the transferor for his failure to inform Government of the transfer. In these circumstances, we think that the statute being a taxing statute, it must be construed strictly and in favour of the subject.

[12] It is argued on behalf of the Province of Bombay, relying upon the case in *Waman Ramkrishna v. Ganpat Mahadeo*, (37 Bom. L. R. 925 : A. I. R. (23) 1936 Bom. 10), that partition constitutes a transfer. But we are unable to accept the contention. The result is that there was no transfer within the meaning of S. 16 cl. (G) of Bombay Act II [2] of 1863.

[13] The appeal will, therefore, be allowed, the decrees of the lower Courts set aside and the plaintiff's claim decreed with costs throughout.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Bombay 250 [C. N. 66.]

BHAGWATI J.

Vishwanath Keshav Joshi — Plaintiff v. B. M. Sukhadwala — Defendant.

O. C. J. Suit No. 700 of 1948, Decided on 11th October 1948.

Bombay City Civil Courts Act (XL [40] of 1948), S. 18—“Proceeding” includes execution proceedings—Decree by High Court for amount exceeding Rs. 2000 and not exceeding Rs. 10,000—Execution application after coming into force of Act is not maintainable in High Court—Application lies in City Civil Court.

The word “proceeding” in S. 18 includes execution proceedings. Consequently the High Court has no jurisdiction to entertain application for execution of a decree passed by it for an amount exceeding Rs. 2,000 but not exceeding Rs. 10,000 filed after the Act came into force, i.e. 16th August 1948. The execution proceedings in such a case lie in Bombay City Civil Court. [Para 5]

B. J. Diwan, Amicus curiae.

Order.—The matter comes up before me for trial of issue as to the jurisdiction of this Court to entertain proceedings in execution of a decree passed by this Court, the decree being for an amount above Rs. 2,000 and below Rs. 10,000. The decree was passed in the suit on 2nd April 1948, and this application for execution was made by the judgment-creditor on 22 September 1948.

[2] A point was raised as to whether in view of the passing of the Bombay City Civil Court Act, XL [40] of 1948, this Court had jurisdiction to entertain this application for execution of the decree. The Bombay Act XL [40] of 1948 was enacted by the Legislature and received the assent of the Governor-General on 10th May 1948. It came into force by a notification in the official Gazette from 16th August 1948. Section 3 of that Act provided that notwithstanding anything contained in any law, the Bombay City Civil Court was to have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value and arising within the Greater Bombay except for certain exceptions therein laid down which are not relevant for the determination of the present issue before me. Section 12 of the Act provided that notwithstanding anything contained in any law, the High Court shall not have jurisdiction to try suits and proceedings cognizable by the City Court. Section 18 of the Act further provided that all suits and proceedings cognizable by the City Court and pending in the High Court, in which issues had not been settled or evidence had not been recorded on or before

the date of the coming into force of this Act shall be transferred to the City Court and shall be heard and disposed of by the City Court and the City Court shall have all the powers and jurisdiction thereof as if they had been originally instituted in that Court. These are the relevant provisions of this Act which have got to be borne in mind for the purposes of the determination of this issue.

[3] The jurisdiction of the Bombay City Civil Court was to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding Rs. 10,000 in value. The ban of the jurisdiction of the High Court also was in respect of the trial of suits and proceedings cognizable by the City Court, and what had got to be transferred to the City Civil Court were also suits and proceedings cognizable by the City Court and pending in the High Court in which issues had not been settled or evidence recorded on or before 16th August 1948. The question, therefore, which has to be determined is what is included in the suits and proceedings cognizable by the City Court; and the whole difficulty in this particular matter has arisen because the suit has been already determined, a decree has been passed therein, and what is sought to be done is the execution of that decree. The question, therefore, which arises is whether an application for execution of the decree already passed by the High Court having had jurisdiction to do the same, can be said to be proceedings cognizable by the City Court, because the suit has certainly ended in so far as it has resulted in a decree being passed in favour of the plaintiff. It has been contended that the proceedings which are mentioned in these three sections are by analogy with S. 141, Civil P. C., and according to the decision of the Privy Council in *Thakur Prasad v. Fakirullah*, 17 ALL. 106 at p. 111 : (22 I. A. 44) original matters in the nature of suits such as proceedings in probates, guardianships, and so forth, and not execution proceedings. In so far as this was a matter which was important and would lay down the principle for all proceedings in execution in similar suits where decrees have been passed by this Court before 16th August 1948, I requested Mr. B. J. Diwan to argue the matter per *amicus curiae* and he was good enough to do so and presented the arguments before me at the adjourned hearing of this application today. It was pointed out by him that the word “proceedings” in S. 141, Civil P. C., no doubt has come to be interpreted in this manner by the Privy Council, but execution proceedings are also to be regarded as proceedings though they are subsequently adopted by the party after the decree in a suit has been passed. They are separate

from the proceedings adopted by the parties in furtherance of the progress of the suit or what may be otherwise described as the previous steps in the suit. As has been laid down in *Deb Narain Dutt v. Narendra Krishna*, 16 Cal. 267 at p. 279, execution has to be regarded as separate proceedings from the previous steps in the suit. Even though the expression "suits and other proceedings" has been used in the sections of the Bombay City Civil Court Act which I have noted above, proceedings in suits as well as proceedings of a civil nature which are contemplated after the decree in a suit is passed are nonetheless proceedings within the expression as used therein. Those proceedings may be proceedings which are contemplated within S. 141, Civil P. C., and which have been interpreted by the Privy Council as original matters in the nature of suits such as proceedings in probate, guardianship and so forth. These proceedings can also be proceedings by way of execution proceedings which have been held in *Deb Narain v. Narendra Krishna*, 16 Cal. 267 (F.B.), as separate proceedings from the previous steps in the suit, which may be taken by a party after the suit has materialised into a decree. There is no warrant to read "proceedings of a civil nature" which has been used in the Bombay City Civil Court Act in a restricted or limited sense as is contended on behalf of the judgment-creditor.

[4] It was pointed out to me that the Act does not contemplate taking away the jurisdiction of this Court in respect of suits which have been already disposed of or decided, and that what was contemplated was only the transfer of the suits which were pending in the High Court at the time when the Act came into operation. My attention was particularly drawn to S. 18 of the Act which provides that except in those cases where issues were settled or evidence was led, all suits and proceedings which were pending in the High Court had got to be transferred to the City Civil Court. It was urged that in execution proceedings there would be no question of any issues being settled or evidence being led. This argument, however, is unsound in so far as it does not take count of the various circumstances which arise in execution proceedings where issues have got to be tried by the Court and evidence led in support of the various contentions arising in execution proceedings. Mr. B. J. Diwan drew my attention to the various provisions of the Civil Procedure Code, S. 47, S. 50 (2), O. 21, R. 3, O. 21, R. 4, O. 21, R. 50 (2), O. 21, R. 58 and 59, O. 21, R. 89 and O. 21, R. 97 and the subsequent provisions thereof, all of which go to show that various cases arise in execution proceedings where as between the contesting parties

issues have got to be tried by the Court and for the determination of those issues evidence has also got to be led. If any question arose in such cases of execution proceedings and they had been agitated before the High Court before 16th August 1948, S. 18 would have covered those proceedings also and would have prevented them from being transferred to the City Civil Court if issues had been raised therein or evidence had been led by the parties for the purpose. Except, however, in those cases all the proceedings which were validly entertained by the High Court, before 16th August 1948, would have had to be transferred to the Bombay City Civil Court by virtue of the provisions of S. 18 of the Act. Section 18 of the Act therefore does not help the judgment-creditor.

[5] My attention was also drawn to the provisions of S. 37, Civil P. C., where the expression "Court which passed a decree" or words to that effect are in relation to the execution of decrees deemed to include, where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit. It was pointed out that in those cases where pecuniary jurisdiction was curtailed subsequent to a decree passed by a Court, the jurisdiction to execute the decree was not lost and that in spite of the curtailment of the pecuniary jurisdiction in that manner the Court would continue to have jurisdiction to execute the decree. There is no question here of the Court having ceased to exist. The only question which arises is whether by reason of the pecuniary jurisdiction of this Court being altered in the manner provided in the Bombay City Civil Court Act it can be said that this Court has lost the jurisdiction to execute a decree which has already been passed by it. Reliance was placed in support of this contention on a decision reported in *Abdus Sattar v. Mohini Mohan Das*, 37 C. W. N. 679 (A. I. R. (20) 1933 Cal. 684) and the note in Mulla's Civil Procedure Code at p. 162. This decision, however, runs counter to a decision of the Calcutta High Court itself which is subsequently reported in *Masrab Khan v. Deb Nath Mali*, I. L. R. (1942) 1 Cal. 289 at p. 291 : (A. I. R. (29) 1942 Cal. 321) where the effect of S. 37 (b), Civil P. C., is laid down as substituting the Court in which the jurisdiction was subsequently invested as the only Court which can be considered to be the Court which passed the decree for the purposes of this section. Mr. B. J. Diwan also drew my attention to a decision of our High Court reported in *Gauskha v. Abdul Ropkha*, 17 Bom. 162, where it is laid

down that there is no distinction which can be drawn between the nature of the causes which put an end to jurisdiction, so far as the terms of S. 37 (b) are concerned. What one has got to have regard to are the plain terms of S. 37 (b) themselves which lay down that where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which passed the decree or words to that effect shall in relation to the execution of decrees be deemed to include the Court which would have jurisdiction to try such suit, if the suit wherein the decree was passed was instituted at the time of making the application for execution. Here by reason of the enactment of the Bombay City Civil Court Act the jurisdiction in respect of suits and proceedings of a civil nature exceeding Rs. 2,000 and not exceeding Rs. 10,000 in value was invested in the Bombay City Civil Court. If the suit had come to be filed after 15th August 1948, which is the relevant date (and the application for execution in this case as I have stated before was made on 22nd September 1948), it would have had to be filed in the Bombay City Civil Court. That was the Court which was substituted for the High Court according to the terms of S. 37 (b), Civil P. C., and it is that Court which can be said to be "the Court which passed a decree" in relation to the execution of this decree which was passed by the High Court. I am, therefore, of opinion that in respect of these proceedings for execution of the decree "the Court which passes a decree" should be deemed to include the Bombay City Civil Court which would have jurisdiction to try the suit if it had been filed on 22nd September 1948, which was the date of the application for execution. There is no cogent reason urged on behalf of the judgment-creditor which can make me hold that this Court has in spite of the provisions of the Bombay City Civil Court Act which I have mentioned above retained the jurisdiction to execute the decrees which have been already passed by it in those cases where the claim was exceeding Rs. 2,000 and not exceeding Rs. 10,000 in value.

[6] I have, therefore, come to the conclusion that this application for execution does not lie in this Court and must be dismissed. Before concluding my judgment, I feel that I ought to express the thanks of the Court for the help which it has derived from the arguments of Mr. B. J. Diwan who was good enough to argue this point *per amicus curiae*.

R.G.D.

Application dismissed.

A. I. R. (36) 1949 Bombay 252 [C. N. 67.]

CHAGLA C. J.

Shripatrao Madhavrao Shinde—Plaintiff—Appellant v. Parvatibai Ganpatrao Shinde and another — Defendants — Respondents.

Second Appeal No. 696 of 1944, Decided on 6th February 1948, from order of Asst. Judge, Satara, in Appeal No. 327 of 1941.

Bombay Hereditary Offices Amendment Act (V [5] of 1886), S. 2 — Section not to disable Hindu widow from adopting—Line of male heirs laid down under ordinary Hindu law not altered as regards watan lands by section.

One M was the owner of certain watan lands. On his death they devolved upon his sons S and G. G died leaving his widow P and a son R who also died. On R's death P adopted B.

Held, that S. 2 did not place any disability on the widow from adopting. The disability imposed by the section was on the female heirs. B was not claiming through P but his title was paramount. There was nothing in the section to suggest that the line of male heirs as laid down under the ordinary Hindu law should be altered as far as watan lands were concerned. The ordinary Hindu law as declared by the decision of the Privy Council in A. I. R. (30) 1943 P. C. 196, was that although on the death of R the property would go to the next reversioner of G, viz. S., on the adoption of B the property vested in S would be divested and B would become entitled to it: 37 Bom. 598 and 24 Bom. 484, *held no longer good law.* [Paras 2, 5 & 6]

T. N. Walavalkar — for Appellant.

M. M. Virkar — for Respondents.

Judgment.—In this appeal the question that arises for decision is the succession to certain lands which are governed by the Bombay Hereditary Offices Act, V [5] of 1886. The facts briefly are these. One Madhavrao Shinde was the owner of these lands. On his death they devolved upon his two sons Sripatrao who is the plaintiff and Ganpatrao. Ganpatrao died leaving his widow Parvatibai who is defendant 1. Ganpatrao had a son Ramchandra who died on 22nd July 1921, issueless and unmarried. On 23rd April 1928, Bajirao was adopted by Parvatibai, and the question is whether by reason of the adoption Bajirao, defendant 2, is entitled to the watan lands.

[2] There can be no doubt that if succession was governed by the ordinary principles of Hindu law, in view of the recent decisions of the Privy Council, although on the death of Ramchandra the property would go to the next reversioner of Ganpatrao, viz. plaintiff, on the adoption of Bajirao on 23rd April 1928, the property vested in the plaintiff would be divested and Bajirao would become entitled to those properties. But Mr. Walavalkar contends that the ordinary and normal rule of the Hindu law of succession cannot and should not apply to properties which are watan lands and governed by Act V [5] of 1886. In support of his contention he first relies on a passage in the case of *Anant Bhikappa Patil*

v. Shankar Ramchandra Patil, 46 Bom. L. R. 1 : (A. I. R. (30) 1943 P. C. 196). Sir George Rankin in delivering the judgment points out that the properties in that suit were governed by Act V [5] of 1886 and he goes on to say that that Act imposes a special rule of succession whereby every female, other than the widow of the last male owner, is postponed to every male member of the watan family qualified to inherit, and Sir George Rankin adds (p. 4) ;

"No other feature special to watan property was relied on or discussed in the Courts in India or mentioned in the printed case lodged by the parties upon this appeal, and their Lordships are not called upon or prepared to consider whether upon other grounds the law applicable to watandars or watan property varies from the ordinary Hindu law."

[3] The question, therefore, I have got to consider is whether there is any special feature in the Watan Act which would induce me to hold that the law applicable to watandars or watan property is different from the ordinary Hindu law. Section 2 of Act V [5] of 1886, which is relied upon, is to the following effect :

"Every female member of a watan family other than the widow of the last male owner, and every person claiming through any female, shall be postponed in the order of succession to any watan, or part thereof or interest therein, devolving by inheritance after the date when this Act comes into force to every male member of the family qualified to inherit such watan, or part thereof or interest therein."

[4] Therefore, apart from authority it is clear to my mind that the section prefers male heirs to female heirs excepting the case of the widow of the last owner as far as succession to watan land is concerned.

[5] Now, on the adoption of Bajirao by defendant 1 he became the male heir of Ganpatrao next in succession to Ramchandra, and therefore, when a claim is put forward by him, it is put forward as the male heir of Ganpatrao who is nearer in succession than the plaintiff. The whole fallacy in Mr. Walavalkar's argument lies in this that it is not through the widow of Ganpatrao, defendant 1, that Bajirao claims. If he was claiming through any female, undoubtedly under S. 2 he would be postponed, but his claim, although it arises by reason of the adoption by defendant 1, is not through her but his title is paramount, and on adoption he becomes the male heir of Ganpatrao. Therefore, I see nothing whatever in S. 2 which suggests that the line of male heirs as laid down under ordinary Hindu law should be altered as far as watan lands are concerned and the ordinary Hindu law as now declared by the Privy Council is that on adoption the adopted son divests the property vested in the next reversioner.

[6] Mr. Walavalkar has strongly relied on the decision of Parsons and Ranade JJ. in *Krishnaji*

v. Tarawa, 24 Bom. 484 : (2 Bom. L. R. 276). They were considering also S. 2 of this very Act and the facts of that case undoubtedly were very similar to the facts before me. In that case the watan in question was owned by the brothers Rango and Bhimaji. Bhimaji died and thus Rango became the last male holder. Rango died in 1881 leaving a widow Laxmi, who held until her death in 1892. The widow of Bhimaji, Tarawa, who was still surviving, adopted plaintiff 2 in 1893, and the plaintiff claimed the watan as against the defendant, who was a male member of the family and had been registered by the revenue authorities as the watandar on the death of Laxmi, and the Court there held that the plaintiff was not entitled to succeed. Parsons J. in his judgment stated that in a case where there is a male member qualified to inherit, he inherits, and a widow other than the widow of the last male owner acquires no rights by succession or inheritance, and consequently she cannot create, transfer or revive any by adoption. It is perfectly true that the widow in that case and defendant 1 in this case could not acquire any right by succession or inheritance as female heirs are disqualified under S. 2. But with very great respect, I do not see how it follows that she cannot create, transfer or revive rights by adoption. Ranade J. in a concurring judgment points out that the chief object of the Watan Act was to ensure that the watan property should be in the hands of male heirs who can render personal service in preference to females. But that object of the Act is satisfied by the adopted son who is the heir and the preferential heir succeeding to the watan. The disability imposed by S. 2 is on female heirs. I see no disability placed upon the widow from adopting, and as the Privy Council has now clearly and emphatically laid down the power of the widow to adopt is not exhausted until those circumstances arise which have been indicated by the Privy Council and in this case the power of the widow of Ganpatrao to adopt was certainly not exhausted as Ramchandra died issueless and without leaving a widow.

[7] My attention has also been drawn to *Amarendra Man Singh v. Sanatan Singh*, 35 Bom. L. R. 859 : (A. I. R. (20) 1933 P. C. 155) and at p. 871 Sir George Lowndes delivering the judgment of the Privy Council referred to the case of *Bhimabai v. Tayappa* [Murarrao, 37 Bom. 598 : (21 I. C. 107) and he pointed out that unless there was something in the nature of watan property which made the decision in *Pratapsing's case*, A. I. R. (5) 1918 P. C. 192 : (43 Bom. 778) inapplicable, their Lordships thought that the case can no longer be regarded as authoritative.

[8] If Mr. Walavalkar's contentions were sound, then the decision in *Bhimabai's case*, (37 Bom. 598 : 21 I. C. 107) should still be good law because there also the plaintiff as the next reversioner sued to recover possession of the watan property against the defendant who had been adopted by the widow, and the Court held that the property vested in the plaintiff could not be divested by the adoption made by the widow. But it is clear that *Bhimabai's case*, (37 Bom. 598 : 21 I. C. 107) no longer lays down the correct law. In my opinion therefore the decision in *Krishnaji v. Tarawa*, (24 Bom. 484 : 2 Bom. L. R. 276) is no longer good law in view of the recent decisions of the Privy Council and therefore on the adoption of defendant 2 by defendant 1 defendant 2 became entitled to watan lands.

[9] The appeal must, therefore, fail and must be dismissed with costs.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 254 [C. N. 68.]

DESAI J.

Bai Aimai Limjibhai Kavarana — Plaintiff v. Minoo Manchershaw Davar — Defendant.

O. C. J. Suit No. 2200 of 1948, Decided on 30th September 1948.

Bombay City Civil Courts Act (XL [40] of 1948), S. 3—Jurisdiction — Suit to recover possession of part of house from defendant alleged to be in possession as licensee—Letting value of house Rs. 50 per month — Valuation of suit for purposes of jurisdiction above Rs. 10,000 — High Court has jurisdiction — Bombay Rents, Hotel and Lodging House Rates Control Act (LVII [57] of 1947) has no application, suit being between licensor and licensee and not landlord and tenant — Court-fees Act (1870), S. 7 (v) — Suits Valuation Act (1887), S. 8 — Bombay Rents, Hotel and Lodging House Rates Control Act (LVII [57] of 1947).

Bombay High Court has jurisdiction to entertain a suit for recovery of possession of a part of a house the monthly letting value of which is Rs. 50, from the defendant who is alleged to be in occupation as a licensee, notwithstanding the Bombay City Civil Courts Act, because the claim for purposes of jurisdiction in such a suit has to be valued at over Rs. 10,000. Section 8, Suits Valuation Act, which has left untouched S. 7 (v), Court-fees Act, has no application to such a suit.

Similarly, Bombay Rents, Hotel and Lodging House Rates Control Act, which applies to suits between landlord and tenant, has no application to such a suit between licensor and licensee. [Paras 3, 5, 11 and 13]

Annotation : ('44-Com.) Court-fees Act, S. 7 (v), N 12 ; ('44-Com.) Suits Valuation Act, S. 8, N. 10 and 12.

N. A. Mody and M. L. Maneksha — for Plaintiff.

M. P. Amin, Advocate-General and A. J. Poonawalla — for Defendant.

Judgment.—The plaintiff is the mother-in-law of the defendant. The plaintiff says that after

the marriage of her daughter with the defendant, the defendant was allowed to stay in the plaintiff's flat with the plaintiff's leave and license and that the defendant is at present in wrongful occupation of one bed-room in that flat as the license given by the plaintiff to the defendant has been withdrawn. The plaintiff submits that the defendant is a trespasser in respect of that room and that he is liable to pay damages for trespass at the rate of Rs. 50 per month or at such other rate as this Court may determine from 20th June 1948. The plaintiff prays that the defendant, his servants and agents may be ordered to remove himself and them from the room in the flat with their belongings and that the defendant, his servants and agents may be restrained by an order and injunction of this Court from entering the flat or occupying any room therein; and that the defendant should be ordered to pay to the plaintiff damages at the rate of Rs. 50 per month or at such other rate as this Court may determine from 20th June 1948, till the injunction prayed for becomes effective.

[2] The defendant denies that he is the licensee in occupation of the room under a license from the plaintiff and he says that he is a sub-tenant of the plaintiff. At the hearing the following issues were raised :

(1) Whether having regard to the Bombay Rent Control Act, LVII [57] of 1947 and/or the Bombay City Civil Court Act, 1948, this Honourable Court has jurisdiction to entertain the suit ?

(2) Whether the defendant is a licensee or a sub-tenant of the plaintiff ?

(3) Whether the plaintiff is entitled to any, and if so, what reliefs ? and

(4) Whether the plaintiff is entitled to compensation, and if so, at what rate ?

[3] The Advocate-General appearing with Mr. Poonawalla on behalf of the defendant argued issue No. 1 first, as his submission was that if this Court had no jurisdiction to entertain the suit, the question whether the defendant was a licensee or a sub-tenant could not be decided by this Court. The Advocate-General did not press the point that this Court had no jurisdiction because of the Bombay Rent Control Act (LVII [57] of 1947), as he realized that that Act applied only in cases where the relationship of landlord and tenant subsisted. Though the defendant in this case maintains that he was the sub-tenant of the plaintiff, the plaintiff has denied that allegation and has brought this suit on the footing that the defendant was a licensee only. If in the course of the hearing it transpires that the defendant was not the licensee but was the sub-tenant, the plaintiff's suit will fail. There is no relief that this Court is going to give to the plaintiff on the footing that the defendant is the tenant of the plaintiff.

[4] The Advocate-General argued that the Bombay City Civil Court Act, 1948, takes away the jurisdiction of the High Court to try this suit. The Advocate-General referred me to S. 7, sub-cl. (xi) (cc), Court-fees Act (VII [7] of 1870), which provides for the court-fees to be levied in suits between landlord and tenant for the recovery of immovable property from a tenant, including a tenant holding over after the determination of a tenancy. In such suits by S. 7, sub-cl. (xi), it is provided that the court-fees have to be levied according to the amount of the rent of the immovable property to which the suit refers, payable for the year next before the date of presenting the plaint. I pointed out to the learned Advocate-General that the present suit is not a suit between a landlord and a tenant and, therefore, the provisions of S. 7, sub-cl. (xi) (cc), Court-fees Act, did not apply. But the learned Advocate-General maintains that the same considerations must apply to the facts of the present case. He said that assuming that the defendant was a licensee, he was not a trespasser, and if for the purposes of the Court-fees Act the amount must be assessed on the basis of the rent payable for the year next before the date of the presentation of the plaint in the case of a tenant, the same considerations must apply for the purpose of determination of the jurisdiction of this Court to entertain this suit.

[5] The learned Advocate-General referred me to S. 8, Suits Valuation Act, (VII [7] of 1887) which reads as follows:

"Where in suits other than those referred to in the Court-fees Act, 1870, S. 7, paras. V, VI and IX and para. X, cl. (d), court-fees are payable *ad valorem* under the Court-fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same."

Proceeding on the footing that for the purpose of the assessment of the court-fees S. 7, sub-cl. (xi) (cc), applies, he said that the same valuation must apply for the purposes of the determination of the jurisdiction in this case. I pointed out to the learned Advocate-General that S. 8, Suits Valuation Act, specifically excluded from its operation S. 7, para. (v), Court-fees Act (VII [7] of 1870), which reads as follows:

"In suits for the possession of lands, houses and gardens — according to the value of the subject-matter; and such value shall be deemed to be" etc. etc.

Therefore where we are concerned with suits for the possession of lands, houses and gardens, the valuation which is to be determined according to the provisions of S. 7, sub-cl. (v), Court-fees Act (VII [7] of 1870), will not be the valuation for the purpose of determining the jurisdiction under the Suits Valuation Act (VII [7] of 1887). The learned Advocate-General conceded that the suit for the possession of a part of the house

would also fall under S. 7, sub-cl. (v), Court-fees Act (VII [7] of 1870).

[6] Mr. N. A. Mody appearing on behalf of the plaintiff pointed out this further difficulty that S. 3, Suits Valuation Act (VII [7] of 1887), provides as follows :

"3. (1) The Provincial Government may, subject to the control of the Governor-General in Council, make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court-fees Act 1870, S. 7, paras. V and VI and para. X, cl. (d)."

"(2) The rules may determine the value of any class of land, or of any interest in land, in the whole or any part of a local area, and may prescribe different values for different places within the same local area."

Mr. Mody pointed out that the Provincial Government had not made any rules as provided for by S. 3 of that Act. In this connection Mr. Mody pointed out that S. 14, Madras Civil Courts Act, provides as follows :

"When the subject-matter of any suit or proceeding is land, a house or a garden, its value shall, for the purposes of the jurisdiction conferred by this Act, be fixed in manner provided by the Court-fees Act, S. 7 (v)." There is no such provision to be found in the Bombay City Civil Court Act (XL [40] of 1948).

[7] In the result I am afraid I derive no assistance from the Court-fees Act or the Suits Valuation Act.

[8] This being the position, I turn to the Bombay City Civil Court Act (Bombay XL [40] of 1948). By S. 3 of that Act, it is provided that "the Provincial Government may, by notification in the *Official Gazette*, establish for the Greater Bombay a Court, to be called the Bombay City Civil Court. Notwithstanding anything contained in any law, such Court shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding ten thousand rupees in value, and arising within the Greater Bombay"

What I shall now consider is whether the present suit is a suit not exceeding Rs. 10,000 in value. These words, in my opinion, mean that the value of the subject-matter of the suit should not exceed Rs. 10,000. The learned Advocate-General referred me to S. 110, Civil P. C., which says that

"in each of the cases mentioned in cls. (a) and (b) of S. 109 the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

"or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value."

The Advocate-General said that this case does not fall within the first part of S. 110, Civil P. C. as the value of the subject-matter of the suit is not above Rs. 10,000 as according to him, the value of the subject-matter of the suit could not in any event be computed as more than the total of one year's rent or compensation payable in respect of the room in the occupation of the defendant.

[9] The learned Advocate-General referred me to *Kasturbhai v. Hiralal*, 24 Bom. L. R. 350 : (A. I. R. (10) 1923 Bom. 23) where the head-note reads as follows :

"The plaintiffs sued to evict the defendant from their premises, under the Bombay Rent Act on the ground that they reasonably and *bona fide* required the premises for their own use and occupation. The monthly rent of the portion occupied by the defendant was Rs. 275. The Court of first instance passed a decree for possession in favour of the plaintiffs and it was confirmed by the Court of Appeal. The defendant, thereupon, applied for a certificate to appeal to the King in Council. It was held that the certificate must be granted, for the decree allowing possession of the tenancy involved directly a claim or question to or respecting property over Rs. 10,000 as the monthly rent of the premises was Rs. 275 and capitalized at twenty years' purchase the value of the property would be over Rs. 10,000."

The Advocate-General argued that for the purposes of the Bombay City Civil Court Act, what I am concerned with is the value of the subject-matter of the suit. He argued that in *Kasturbhai v. Hiralal*, 24 Bom. L. R. 350 : (A. I. R. (10) 1923 Bom. 23) their Lordships did not consider the question of the value of the subject-matter of the suit, and they gave leave to appeal to the Privy Council as the decree allowing possession involved directly a claim or question to or respecting property over Rs. 10,000 in value. In my opinion in the case of *Kasturbhai v. Hiralal*, 24 Bom. L. R. 350 : (A. I. R. (10) 1923 Bom. 23) the value of the subject-matter of the suit also was over Rs. 10,000 though that is not the ground on which the right to obtain a certificate was recognized. The distinction that the learned Advocate-General seeks to make between the value of the tenancy and the value of the property, in my opinion, is not the correct distinction as I am concerned with the value of the property in the defendant's possession. The suit is to recover possession of property, the value whereof, for the reasons which I shall hereinafter set out, in my opinion, is more than Rs. 10,000. That is the property which is the subject-matter of the suit. In my opinion, therefore, the City Civil Court has not got the jurisdiction to try this suit and the High Court has jurisdiction to try this suit.

[10] The learned Advocate-General referred me to *Balkrishna v. Ramkrishna*, 33 Bom. L. R. 263 : (A. I. R. (18) 1931 Bom. 234). The plaintiff in that suit sued to recover arrears for two years' rent with interest (viz. Rs. 51-5-0) and possession of the property from his tenant. A question having arisen what was the valuation of the suit for purposes of court-fees, it was held that the claim for recovery of possession should be valued at one year's rent preceding the suit (viz. Rs. 23-10-6) under S. 7 (xi) (cc), Court-fees Act, 1870, and that the court-fees were leviable on Rs. 74-15-6. It is clear, however, that that

was a suit between a landlord and a tenant; and if so, it is equally clear that S. 7, sub-cl. (xi) (cc), applied. If this suit had been a suit filed by a landlord for the recovery of possession from a tenant, this Court would not have jurisdiction to try the suit.

[11] The Advocate-General next referred me to *Jamnadas v. Chandulal*, 39 Bom. L. R. 138 : (A. I. R. (24) 1937 Bom. 167). It was there held that in a suit for declaration and injunction the valuation of claim for the computation for court-fees and for purposes of jurisdiction being the same, under S. 8, Suits Valuation Act, the value adopted for court-fee purposes under S. 7 (iv) (c), Court-fees Act, 1870, will determine the jurisdiction of the Court which hears the case. But as appears from the judgment of Beaumont C. J. in that case, though the value of the property which was the subject-matter of the suit exceeded Rs. 5000, it was held that the second class Subordinate Judge, whose jurisdiction was limited to suits wherein the subject-matter did not exceed in amount or value Rs. 5000, had the jurisdiction to try the suits because the valuation had, for the purposes of jurisdiction, to be fixed having regard to S. 8, Suits Valuation Act of 1887. But this again brings me back to the same point, namely, that para. (v) of S. 7, Court-fees Act of 1870, has been left untouched by S. 8, Suits Valuation Act of 1887.

[12] What then are the grounds on which I am holding that the subject-matter of this suit is over Rs. 10,000? The plaint states that Rs. 50 would be the amount payable by way of damages for deprivation of the plaintiff's right to use the room in the defendant's occupation. The yearly rent of that room would come to Rs. 600, and adopting the test laid down in *Kasturbhai v. Hiralal*, 24 Bom. L. R. 350 : (A. I. R. (10) 1923 Bom. 23) that sum capitalised at twenty years' purchase would bring the value of the subject-matter of the suit to over Rs. 10,000. The evidence in this case establishes the value of the room as at least Rs. 50 per month.

[13] I must point out that the suit was filed on 6th August 1948, and the Bombay City Civil Court Act, 1948, (Bombay Act XL [40] of 1948), came into operation on 16th August 1948. I have no reason to think that the figure of Rs. 450 as damages caused to the plaintiff every month was inserted merely for the purpose of enabling the High Court to have jurisdiction to try the suit. This being my opinion, I hold that this Court has jurisdiction to entertain this suit.

[14] I answer Issue 1 in the affirmative.

[15] After I delivered the above judgment, Mr. Mody on behalf of the plaintiff drew my attention to the case of *Ratilal Manilal v. Chandulal Chhotalal*, 49 Bom. L. R. 552 : (A. I. R.

(34) 1947 Bom. 482) where it was held that in a suit for possession of a house, where the plaintiff claimed that the defendant in possession was his licensee, the court-fee was payable according to the market value of the house, under S. 7, sub-cl. (v) (e), Court-fees Act, 1870. This case supports my judgment that the provisions of S. 8, Suits Valuation Act (VII [7] of 1887) have no application to this particular case.

R.G.D.

Order accordingly.

A. I. R. (36) 1949 Bombay 257 [C. N. 69.]

CHAGLA C. J. AND BHAGWATI J.

Tarmahomed Haji Abdul Rehman — Defendant — Appellant v. Tyeb Ebrahim Bhamchhari — Plaintiff — Respondent.

O. C. J. Appeal No. 58 of 1948, Decided on 10th November 1948.

Negotiable Instruments Act (1881), S. 118—Presumption under—Presumption is in favour of there being consideration valid in law and not consideration mentioned in negotiable instrument—Burden to prove contrary is on defendant even though consideration mentioned in instrument turns out to be wrongly described — Whole evidence to be considered to determine proof of contrary — Plaintiff attempting but failing to prove consideration — Burden to prove contrary not discharged.

Section 118 raises a statutory presumption in favour of there being consideration for every negotiable instrument. The presumption continues until it is rebutted and the only way it can be rebutted is by proving the contrary, viz., that the negotiable instrument was without consideration. The presumption that is raised under the section is not in respect of the consideration mentioned in the negotiable instrument but the presumption is in favour of there being a consideration for the negotiable instrument, any consideration which is a valid consideration in law. It is perfectly true that if a particular consideration is mentioned in a negotiable instrument and that consideration is found to be false and some other consideration is set up, that is a factor which the Court would take into consideration in deciding whether the defendant had discharged the burden cast upon him by S. 118. But the mere fact that the consideration mentioned in the negotiable instrument turns out to be wrongly described does not rebut the presumption under S. 118 and the burden still lies on the defendant to satisfy the Court that there was no consideration for the instrument. In order to determine whether the contrary is proved or not as required by S. 118, the whole volume of evidence led before the Court including admissions of the plaintiff made in his cross-examination, must be considered. But in considering the volume of evidence the Court must always bear in mind the statutory presumption and also the fact that the burden of proof lies upon the defendant and that burden has got to be discharged by the defendant. Where the plaintiff attempts to prove a particular consideration, the mere fact that he failed to prove such a consideration does not, in any way, relieve the defendant from his obligation in law to establish the contrary of the presumption: A. I. R. (30) 1943 Cal. 22; A. I. R. (22) 1935 All. 509 and A. I. R. (10) 1923 All. 214, *Rel. on*; A. I. R. (14) 1927 Lah. 864 and A. I. R. (2) 1915 Lah. 86, *Dissent.* [Paras 2, 3 and 4]

Annotation: (46-Man.) Negotiable Instruments Act, S. 118, N. 2.

1949 B/33 & 34

Purshottam Tricumdas and A. A. Peerbhoy —
for Appellant.

M. P. Amin, Acting Advocate-General and Sir Jamshedji Kanga — for Respondent.

Chagla C. J. — This is an appeal from a judgment of Tendolkar J., by which he passed a decree for Rs. 8,000 in favour of the plaintiff. The plaintiff filed a suit on three hundis, two dated 4th April 1947, payable 90 days after the date of the hundis, and the third hundi dated 29th April 1947, for Rs. 3000 payable 68 days after the date of the hundi. The defence of the defendant was that these hundis were passed for accommodation. At the trial three issues were raised:

"(1) Whether the hundis were passed for the accommodation of the plaintiff as alleged in para. 2 of the written statement?

(2) What relief is the plaintiff entitled to? and

(3) Whether the defendant is entitled to the return of the said three hundis as alleged in para. 6 of the written statement and counter-claim?"

[2] The learned Judge came to the conclusion that the defendant had failed to prove that the hundis in suit were passed for accommodation. It was then argued before him that inasmuch as the plaintiff had put forward as the consideration of the hundis something different from what was mentioned in the hundis themselves, the presumption which arises under S. 118, Negotiable Instruments Act, 1881, was rebutted and the burden was upon the plaintiff to prove that there was consideration for these hundis. The hundis mention the amount as the consideration for value received in cash this day, i. e., cash received on the day on which the hundis were executed. But at the hearing the defendant admitted that the consideration mentioned in the hundis was not correct and the real consideration was something different from what was mentioned in the hundis. Now, S. 118, Negotiable Instruments Act, raises a statutory presumption in favour of there being consideration for every negotiable instrument, and the language of the section is that "Until the contrary is proved, the following presumptions shall be made: (a) that every negotiable instrument was made or drawn for consideration. . . ." Those are the material words with which we are concerned. Therefore, the statutory presumption continues until it is rebutted, and the only way it can be rebutted is by proving the contrary, viz., that the negotiable instrument was without consideration.

[3] Now, what was urged before Tendolkar J. and what has been urged before us is that as soon as it is shown that the consideration mentioned in the negotiable instrument is not the real consideration, the presumption under S. 118 is rebutted and it is for the plaintiff who is suing on the negotiable instrument to prove what the real consideration was. Looking to the

plain language of the section, it is impossible to accept that contention, because the presumption that is raised under S. 118 is not in respect of the consideration mentioned in the negotiable instrument; the presumption is in favour of there being a consideration for the negotiable instrument, any consideration which is a valid consideration in law. Mr. Purshottam for the appellant wants us to read the section as if it were worded thus: That every negotiable instrument was made or drawn for consideration mentioned in the negotiable instrument. There is no warrant for importing into the section words which the Legislature did not think fit to incorporate in that section. Two judgments of the Lahore High Court have been relied upon for the purpose of putting this interpretation upon the section. One is *Mt. Zohra Jan v. Mt. Rajan Bibi*, 48 P. R. 1915 : (A. I. R. (2) 1915 Lah. 86) and the other is *Sundar Singh v. Khushi Ram*, A. I. R. (14) 1927 Lah. 864 : (102 I. C. 42). With very great respect to the Lahore High Court, the learned Judges have not attached sufficient importance to the plain language of the section and have more been carried away with the question of appreciation of evidence and the approach to the evidence led rather than the legal construction of the section in the statute. It is perfectly true that if a particular consideration is mentioned in a negotiable instrument and that consideration is found to be false and some other consideration is set up, that is a factor which the Court would take into consideration in deciding whether the defendant has discharged the burden cast upon him by S. 118. But it is a very different thing to say that merely because the consideration mentioned in the negotiable instrument turns out to be false, therefore the statutory presumption is rebutted and the burden is thrown upon the plaintiff to prove the consideration. Pal J. of the Calcutta High Court, although his observations are obiter in *Ramani Mohan v. Surjya Kumar Dhar*, A. I. R. (30) 1943 CAL. 22 : (204 I. C. 259), has taken a different view as to the true construction of the section from the view taken by the Lahore High Court. In our opinion, therefore, Tendolkar J. was right in coming to the conclusion that the mere fact that the consideration mentioned in the three hundis turned out to be wrongly described did not rebut the presumption under S. 118, and the burden still lay on the defendant to satisfy the Court that there was no consideration for the three hundis.

[4] The learned Judge on a review of the evidence came to the conclusion that the defendant had failed to prove that the three hundis were for accommodation and he gave his finding on the first issue accordingly. That should

have been sufficient to dispose of the suit and a decree would have followed in favour of the plaintiff. But in view of this legal argument advanced, the learned Judge thought it necessary, in the event of a higher Court taking a different view, to approach the case from a different angle. If the legal view was as laid down by the Lahore High Court, then undoubtedly the burden to prove the consideration would have been on the plaintiff inasmuch as the consideration mentioned in the hundis had been found to be false. He, therefore, went on to consider whether the plaintiff had succeeded in proving that there was consideration for the three hundis, and having considered the evidence of the plaintiff and the witnesses examined by him he came to the conclusion that the plaintiff had failed to prove that there was that consideration for the three hundis which he alleged and on which he relied. Now, it is argued by Mr. Purshottam that this finding of the learned Judge is tantamount to a finding that there is no consideration for the three hundis and that in any view of the case the defendant has succeeded in rebutting the presumption raised by S. 118, Negotiable Instruments Act. As I have already pointed out, this finding of the learned Judge must be viewed and appreciated in its own context. The learned Judge was considering not whether the defendant had discharged the burden, but whether the plaintiff had discharged the burden in the event of its being held that the burden was on the plaintiff, and all that he held was that the plaintiff had failed to discharge the burden of proving consideration. But as I have already pointed out earlier, the statutory presumption continued in favour of the plaintiff and therefore it was for the defendant to establish that there was no consideration. It is one thing to say that the plaintiff has failed to prove a particular consideration for the three hundis; it is an entirely different thing to say that it was proved that there was no consideration at all for the three hundis. The mere failure to prove consideration on the part of the plaintiff did not establish that the hundis were for accommodation as the defendant alleged, or that the defendant had succeeded in proving that there was no consideration at all for these hundis. Mr. Purshottam has made a grievance of the fact that the learned Judge has considered the evidence in two water-tight compartments. He has considered only the evidence of the defendant in coming to the conclusion that the defendant had failed to discharge the burden. What the learned Judge should have done was to have considered the evidence as a whole, and according to Mr. Purshottam it is not merely from

the evidence of the defendant that it can be established that there was no consideration, but it is open to the defendant to prove his case even from the mouth of the plaintiff himself. There Mr. Purshottam is quite right. In order to determine whether the contrary is proved or not, as required by S. 118, the whole volume of the evidence led before the Court must be considered. Very often important admissions are elicited by counsel for the defendant by cross-examining the plaintiff and those admissions certainly can be availed of by the defendant. But in considering the whole volume of evidence the Court must always bear in mind the statutory presumption under S. 118 and also the fact that the burden of proof lies upon the defendant and that burden has got to be discharged by the defendant. How that burden can be discharged or whether it has been discharged is a matter of appreciation of evidence. As a matter of fact, in this case no express issue was raised as to the consideration. The only issue, as I have pointed out, was whether the hundis were passed for accommodation as alleged by the defendant. But the learned Judge points out—and this has been strongly relied upon by Mr. Purshottam—that the plaintiff himself put forward his version of the consideration, and although no issue was in terms raised by the learned Judge, he says in his judgment that it has been tried and answered by him. But even assuming that the learned Judge was right in considering an issue which was not expressly raised and to which the attention of the parties was not directed, even so the only finding on this issue is that the plaintiff has failed to prove the consideration which he set out to prove. That does not get over the earlier finding of the learned Judge that the defendant had failed to prove that the hundis were passed for accommodation. We must look at both these findings in order to try and assess what is the effect of these two findings. In our opinion, it is clear that the learned Judge comes to the conclusion that the defendant has failed to prove want of consideration as required by S. 118, and then he goes on to say that the plaintiff also has failed to prove the particular consideration which he attempted to prove. Now, it must be borne in mind that as soon as the learned Judge had decided that the defendant had failed to prove that the hundis were passed for accommodation it was entirely unnecessary and irrelevant to consider whether the plaintiff had failed to prove consideration or not. It was not necessary for the plaintiff to prove any consideration. The presumption under S. 118 continued in all its rigour. Assuming that the plaintiff did attempt to prove consideration, the mere fact that he failed to prove such a

consideration did not in any way relieve the defendant from his obligation in law to establish the contrary of the presumption raised by S. 118, Negotiable Instruments Act. Therefore, we do not read the finding of the learned Judge as meaning that on the record it has been established and proved that there was no consideration for the three hundis.

[5] Certain authorities have been cited at the Bar and considerable emphasis has been laid by Mr. Purshottam on a decision of the Allahabad High Court reported in *Lal Girwar Lal v. Dau Dayal*, 57 ALL. 895; (A. I. R. (22) 1935 ALL. 509). All that that case lays down is that where the Court, after a careful consideration of the entire evidence, records a clear finding one way or the other, then that finding is based not on a mere presumption but on the evidence and has to be accepted. With great respect, that is a proposition of law which is unexceptionable. If Tendolkar J. had given a clear finding that there was no consideration for the three hundis, then, apart from any question of presumption, that finding if accepted, would have resulted in the defendant succeeding, because the result of that finding would be that the presumption under S. 118 had been rebutted. Two cases were referred to in this judgment of the Allahabad High Court by Sulaiman J. and both those cases have also been referred to at the Bar. One is another decision of the Allahabad High Court, *Md. Shafi Khan v. Md. Moazzam Ali*, A. I. R. (10) 1923 ALL. 214; (79 I. C. 464). That case decided that in case where consideration is denied and the plaintiff goes into the witness box and the result of his cross-examination is such that he failed to establish the point which he set out to make, viz., that he gave the consideration, and the Court is satisfied that he did not give the consideration, the defendant can avail himself of that. It is to be noted that in that case there was only one issue as to consideration, and on that issue the Court considering the contradictory evidence given by the plaintiff came to the conclusion that there was no consideration, and Sulaiman J. in *Lal Girwar Lal v. Dau Dayal*, 57 ALL. 895; (A. I. R. (22) 1935 ALL. 509), sounds a note of warning as to how that case should be properly understood, and this is what he says (p. 898):

"We are not satisfied that it was meant to be laid down in that case that where the plaintiff merely fails to prove that consideration passed and the defendant also fails to prove that he did not get consideration, there is no presumption in favour of the plaintiff." That is exactly the case here. The plaintiff has failed to prove that consideration passed and the defendant has also failed to prove that he did not get consideration. Under those circumstances the presumption in favour of the plaintiff continues. The other case is *L. Ram Nath v. Lala*

Ram Chandra Mal, A. I. R. (22) 1935 ALL. 154; (158 I. C. 193). In that case the plaintiff sued on a promissory note and a receipt on which he claimed that Rs. 2,000 cash had been lent to the defendants. The defendants, on the other hand, admitted the execution of the promissory note and the receipt, but they denied that there was a loan of Rs. 2,000 cash. The plaintiff failed to prove consideration and the defendant also did not prove the allegations made by him. A Divisional Bench of the Allahabad High Court consisting of Niamatullah and Bennett JJ. held that in that state of the record the presumption under S. 118 applied and the suit should be decreed.

[6] These authorities clearly show that the presumption under S. 118 is not rebutted till it is proved that there is no consideration for the negotiable instrument, and the mere fact that the plaintiff fails to prove the particular consideration on which he relies is not sufficient to rebut that presumption and lead the Court to the conclusion that the contrary as required by S. 118 has been proved. In this case it is clear that the defendant failed to prove that the hundis were for accommodation, and the mere fact that the plaintiff also failed to prove the consideration on which he relied is not sufficient to lead one to the conclusion that the presumption under S. 118 has been rebutted.

[7] The findings of facts as arrived at by the learned Judge have been accepted by Mr. Purshottam and therefore the result is that the learned Judge was right in coming to the conclusion that he did. The appeal, therefore, fails and must be dismissed with costs. In taxing the costs of the appeal, costs of including the notes of evidence in the record to be disallowed. As regards the cross-objections, they deal with the order for costs made by the trial Court. In the exercise of his discretion he allowed only two-thirds costs to the plaintiff. We see no reason why we should interfere with the discretion exercised by the learned Judge. Cross-objections, therefore, must be dismissed with costs.

Bhagwati J. — I agree and have nothing to add.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 260 [C. N. 70.]

CHAGLA C. J. AND BHAGWATI J.

Dhulesaheb Dawalsahab Jambaji — Appellant v. *Municipal Borough, Bijapur* — Respondent.

Second Appeal No. 110 of 1945, Decided on 30th August 1948, from order of Dist. Judge, Bijapur, in Appeal No. 118 of 1944.

Limitation Act (1908), Art. 182, Expl. 1 — Joint and several decree — Suit decreed against defend-

dant 1 and dismissed against defendants 2 and 3 — Appeal to District Judge against dismissal allowed and suit decreed against all defendants — Costs of appeal directed to be paid by defendants 2 and 3 — Execution against defendant 1 of trial Court decree disposed of — Appeal by defendants 2 and 3 against appellate decree — During pendency of appeal decree-holder taking out execution of appellate decree of District Judge against defendant 1 — Execution disposed of, on defendant 1's paying decretal amount and costs of trial Court — Second appeal of defendants 2 and 3 dismissed — Another execution for costs of appellate Court against defendant 2, filed beyond three years of date of decree of District Judge — Decree for costs passed by District Judge held was not joint decree against all defendants — Previous execution against defendant 1 could not be availed of to save limitation — Execution therefore held was barred.

Plaintiff obtained a decree against defendant 1 and the suit against defendants 2 and 3 was dismissed. Plaintiff appealed against the dismissal to the District Judge who allowed the appeal on 11th August 1936 and awarded to the plaintiff a decree against all the defendants. The decree contained provisions as to costs. The costs of the appeal were to be paid by defendants 2 and 3. When the appeal was pending the plaintiff took out on 8th April 1936 execution of the trial Court decree by Execution No. 298 of 1936 against defendant 1. The execution application was disposed of on 12th August 1936. Defendants 2 and 3 preferred appeal against the decree of the District Judge to the High Court. This appeal, however, was dismissed with costs. During the pendency of the appeal on 5th July 1938 the plaintiff filed execution No. 474 of 1938 to execute the appellate decree of the District Judge against defendant 1. This application was disposed of on 13th December 1941 by defendant 1 paying the decretal amount and the costs of the trial Court. On 8th April 1943, the plaintiff filed execution No. 210 of 1943 against defendant 2, to recover the costs of the two appeals. On the question whether the execution was barred by limitation:

Held that the decree for costs of two appeals against defendants 2 and 3 was not a joint decree against all the defendants. Plaintiff could not therefore avail himself of the execution application No. 474 of 1938 filed on 5th July 1938 against defendant 1. The execution application filed on 8th April 1943, being beyond three years of the decree of the District Judge was barred by limitation: A. I. R. (13) 1926 All. 440 and A. I. R. (24) 1937 Cal. 547, *Rel. on*; 30 Mad. 268, *Dissent*.

[Paras 4 & 5]

Annotation: ('42-Com.) Limitation Act, Art. 182, N. 141.

G. R. Madbhavi — for Appellant.

N. M. Hungund — for Respondent.

Chagla C. J. — This appeal arises out of execution proceedings, and a few facts may be stated in order to appreciate the contentions of the parties before us. It seems that the plaintiff as the decree-holder obtained a decree in Suit No. 264 of 1934 against defendant 1, and the suit against defendants 2 and 3 was dismissed. The plaintiff-municipality appealed against the order of dismissal. On 11th August 1936, the learned District Judge allowed the appeal and awarded to the municipality a decree against all the defendants. There was also a provision in the decree for the costs of the appeal and that provision was that the costs of the appeal were to be

paid by defendants 2 and 3. The costs of the trial Court were made payable by all the defendants. On 8th April 1936, while the appeal before the District Court was pending, darkhast No. 298 of 1936 was filed by the municipality to execute the decree of the trial Court against defendant 1, and on 12th August 1936, that darkhast was disposed of. From the judgment of the District Court defendants 2 and 3 preferred an appeal to this Court and this Court dismissed the appeal with costs. While this appeal was pending before this Court, on 5th July 1938, the municipality filed darkhast No. 474 of 1938 to execute the appellate decree passed in the appeal disposed of by the District Court. That darkhast was filed against defendant 1 only and in that darkhast the municipality claimed the whole of the decretal amount, the costs of the trial Court and the costs of the appeal before the District Court. Obviously the municipality was in the wrong in trying to execute the decree with regard to the costs of the appeal against defendant 1, and in the darkhast proceedings they withdrew that claim. On 13th December 1941, that darkhast was disposed of by defendant 1 paying the amount of the decree and also the costs of the trial Court. Then on 8th April 1943, the present darkhast, from which this appeal arises, was filed by the municipality against defendant 2 to recover the costs of the two appeals. The executing Court took the view that the darkhast was barred by limitation and dismissed it. The learned District Judge came to the opposite conclusion and reversed the order of the trial Court.

[2] Now, what the judgment-creditor is executing is the decree of this Court passed on 6th December 1938, and *prima facie* as the present darkhast is filed on 8th April 1943, the darkhast is barred by limitation. But the judgment-creditor seeks to avail itself of the darkhast filed on 5th July 1938, viz., darkhast No. 474 of 1938, and the short point that we have to consider is whether it is open to the municipality to avail itself of that darkhast. That darkhast was only against defendant 1; it was not against defendants 2 and 3. But the contention of Mr. Hungund for the respondent is that as the decree that was passed was a joint decree against all the defendants, the darkhast filed against defendant 1 only must take effect also against defendants 2 and 3, and for this purpose reliance is placed on Para. 2 of Explan. 1 to Art. 182, Limitation Act. This paragraph deals with decrees which are severally passed against judgment-debtors and decrees which are passed jointly against judgment-debtors. With regard to decrees which are passed severally, the explanation provides that execution of such a decree against one of the judgment-debtors cannot take effect against the other

judgment-debtors. With regard to joint decrees the provision is that an application for execution against one of the judgment-debtors would take effect against them all. Mr. Hungund's contention is that if there is a decree against more than one judgment-debtor, even though a portion of it may be against some and a portion of it may be against the others, it must be looked upon as a joint decree. It seems to me that this argument on the face of it is untenable and fallacious. There may be a decree containing various provisions; some provisions may be against all the judgment-debtors jointly; others may be provisions severally against some or other of the judgment-debtors. Merely because in a part of it the decree is joint against all the defendants, to say therefore that it is a joint decree is a proposition which, in my opinion, is unstatable and inarguable. According to Mr. Hungund, then, one can never have a decree which is partly joint and partly several. If it is partly joint, then the whole of it is joint and the second part of the explanation would apply to such a decree.

[3] For the purpose of this argument strong reliance is placed on a decision of the Madras High Court in *Subramanya Chettiar v. Alagappa Chettiar*, 30 Mad. 268 : (2 M. L. T. 189), which is a judgment of a Divisional Bench, consisting of Sir Arnold White C. J., and Miller J. There the decree for mesne profits was only against defendants 1 and 2, and a joint decree for his costs against defendants 1, 2, 6 and 9, and the question was whether the application made for execution of the joint decree could take effect against all the defendants within the meaning of the Explanation to Art. 182. The Bench of the Madras High Court held that the second paragraph of the Explanation to Art. 182 must be read literally, and they took the view that although part of the decree was joint in so far as it related to costs and part of the decree was several in so far as it related to mesne profits, still the decree must be looked upon as a joint decree. With very great respect, I am unable to agree with this view of the Madras High Court. It is difficult to understand why even a literal interpretation of the second paragraph of explanation to Art. 182, should drive one to the conclusion to which the Madras High Court seems to have been driven. When the explanation speaks of a decree, it must include a decree or part of a decree or a portion of a decree, and putting that interpretation upon the second paragraph of the explanation it is easy to reconcile all difficulties and to come to a solution which is not illogical or anomalous. The Allahabad High Court has refused to follow the Madras High Court in its interpretation and has taken a contrary view. The case is reported in

Nand Lal Saran v. Dharam Kirti Saran, 48 ALL. 377 : (A. I. R. (13) 1926 ALL. 440), and as that Court points out, the principle underlying the second paragraph of Explan. I to Art. 182 is that when a decree is being executed against A, B and C who are jointly liable under the decree and the application for execution is only against one of them, the judgment-creditor should not be barred from recovering the decretal amount if he fails to recover it from a particular judgment-debtor against whom he has applied for execution. But that principle would not apply in a case where a decree is partly joint and partly several.

[4] The Calcutta High Court had also to consider the same question and it considered it in the case of *Charu Chandra Roy v. Hrishikesh Roy*, A. I. R. (24) 1937 Cal. 547 : (174 I. C. 184), and the principle that Mukherjea J. laid down was that the test that should be applied should be whether the separate relief given against a particular defendant is really a part of the joint decree passed against all the defendants. If it is so, then the execution of the joint decree would keep alive the separate relief also; but if it is in substance a separate decree, that principle would not apply. Now, applying that test here, it cannot be said that the decree for costs against defendants 2 and 3 is a part of the joint decree passed against all the defendants. This decree for costs has nothing whatever to do with the decree passed jointly against all the defendants which was for the decretal amount and the costs of the trial. Defendant 1 had nothing to do with the appeals. He was not a party either to the first appeal or to the second appeal, and it is difficult to see how it could possibly be contended that the decree for costs of the two appeals against defendants 2 and 3 must be looked upon as a joint decree against all the defendants. When the application for execution, Darkhast No. 474, was pending against defendant 1, with regard to the decretal amount and the costs of the trial Court, there was nothing to prevent the municipality also applying for execution against defendants 2 and 3 with regard to the costs of the appeals.

[5] In our opinion, therefore, it is not open to the judgment-creditor to avail itself of Darkhast No. 474 and that darkhast cannot take effect against defendants 2 and 3. Therefore the present darkhast filed on 8th April 1943, is clearly barred by limitation. The result, therefore, will be that the appeal will be allowed with costs throughout.

[6] **Bhagwati J.** — I agree with the conclusion reached by my Lord the Chief Justice. I may, however, add that the principle is correctly laid down in the decision of the Allahabad High Court in *Nand Lal Saran v. Dharam Kirti*

Saran, 48 ALL. 377: (A. I. R. (13) 1926 ALL. 440), at p. 382, where the learned Judge observed:

"The case is different when certain portions of a decree are jointly passed and others severally passed against more persons than one. While a decree-holder is executing a joint portion of the decree against one of the joint judgment-debtors, there is nothing to prevent him from executing the other portions of the decree against the several judgment-debtors who are liable thereunder. It would be expected of a diligent decree-holder that he should do so. We think, therefore, that where a decree is jointly passed against all the defendants in one matter and severally against different defendants with respect to other matters, the first portion of the explanation should apply to decrees passed severally and the second portion to a decree or decrees passed jointly."

Applying this ratio to the facts of this execution matter before us it was open to the municipality when they had filed the Darkhast No. 474 of 1938 against defendant 1 also to file another darkhast against defendants 2 and 3 for recovering the costs of the appeal. This they did not do and it does not avail them now to say that the decree was a joint decree and the present darkhast which they filed for recovery of the costs of the appeal from defendant 2 was in time.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Bombay 262 [C. N. 71.]
TENDOLKAR J.

In re East Africa Hardware Co.

I. C. No. 57 of 1945, Decided on 31st January 1947.

Companies Act (1913), S. 109 (1) (e) — Pledge and mortgage or charge on stock-in-trade not to require registration — Mortgage or charge on movable property other than stock-in-trade to be registered.

In the punctuation of cl. (e) one must read after the word 'pledge' a comma in order that the clause may make sense. The result would be that a pledge would not require registration though a mortgage or a charge on movable property would require registration, provided the movable property was not stock-in-trade. The proviso leads to the result that a mortgage or charge on stock-in-trade would not require registration. [Para 1]

Annotation: ('46-Man.) Companies Act, S. 109, N. 5.

H. M. Seervai — for Petitioner.

M. S. Vakil — for Official Liquidator.

Order. — The third question, as to the necessity for registration, arises in this manner. Section 109, Companies Act, states:

"Every mortgage or charge created after the commencement of this Act by a company and being either (e) a mortgage or a charge, not being a pledge on any moveable property of the company except stock-in-trade, shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator"

The question for consideration is, what is the meaning to be attached to cl. (e) of this section? The clause read with the punctuation as it exists in the statute hardly makes sense. I have not heard of such a thing as a "pledge on a property." One ordinarily talks of "of a pledge of property,"

but a mortgage or charge is "on" a property. It appears to me that in the punctuation of this clause one must read after the word "pledge" a comma in order that the clause may make sense. Thus read, the clause would be "a mortgage or charge, not being a pledge, on any moveable property of the company, except stock-in-trade..." The result would be that a pledge would not require registration, though a mortgage or a charge on movable property would require registration, provided the moveable property was not stock-in-trade. The proviso leads to the result that a mortgage or a charge on stock-in-trade would not require any registration. The case I am dealing with is, as I have held, a case of pledge, but, even if I am wrong in holding that in this case possession of the goods had not been handed over to the petitioner it would still be a mortgage or a charge on stock-in-trade. In either contingency, to my mind, registration is not necessary. The objections urged by respondent 1, therefore, fail.

D.H.

*Order accordingly.***A. I. R. (36) 1949 Bombay 263 [C. N. 72.]**

DIXIT AND JAHAGIRDAR JJ.

Vaman Vasudeo Chitale v. Applicant v. Raghunath Ganesh Thakar—Opponent.

Civil Appln. No. 324 of 1947, Decided on 27th November 1947.

(a) Civil P. C. (1908), S. 24—Bench on appellate side entitled to transfer suit pending on original side to Court in mofussil.

A Bench on the appellate side of the High Court can transfer a suit pending on the original side of the High Court to a Court in the mofussil if satisfied that such a transfer is necessary: Civil Appln. No. 55 of 1915 (Bom.); Civil Appln. No. 672 of 1939 (Bom.) and Civil Appln. No. 1532 of 1945 (Bom.), *Rel. on.* [Para 6]

Annotation: ('44-Com) Civil P. C., S. 24 N. 9.

(b) Civil P. C. (1908), S. 24 — A, resident of Nagpur and B and C, residents of Poona entering into agreement at Bombay—C filing suit against A at Poona — A filing suit against B at Poona — B filing suit against A on original side at Bombay — All suits concerned with consideration and construction of agreement — Suit of B transferred to Court at Poona — Suits of A and B to be tried by same Court.

A, resident of Nagpur, B, resident of Poona and C, resident of Poona entered into an agreement in Bombay. C filed a suit on the agreement against A in the Court of Civil Judge, Junior Division, Poona. Later on A filed a suit in the Court of the Civil Judge, Junior Division, Poona, claiming a declaration that B had no right to say that Rs. 10,000 were deposited with A and for an injunction restraining B from demanding Rs. 10,000 and from filing a suit against A for the same. Shortly afterwards B filed a suit against A on the original side of the High Court of Bombay claiming to recover Rs. 10,000 under the agreement. A made an application in the Bombay High Court for the transfer of the suit filed by B on the original side of the High Court of Bombay to a Court in Poona competent to try it.

Held that (1), the Poona and Bombay suits involved the consideration and the true construction of the agreement entered into by the parties and it was desirable to avoid different conclusions on the construction of the same agreement by different Courts and this was a consideration in favour of the transfer; [Para 7]

(2) as a plaintiff was entitled to file his suit in a forum of his choice, the Court should be slow in changing the forum and in compelling the plaintiff to go to another Court and thereby expose him to unnecessary expenses of litigation. In the present case, however, it was not clear as to whether expenses would be greater at Poona than they would be in Bombay and so the consideration of expenses was not decisive; [Para 11]

(3) the mere fact that suit of A was contended to be not *bona fide* and not maintainable was not by itself sufficient for refusing the transfer application; [Para 8]

(4) the question of convenience was also a relevant though not decisive consideration and from this point of view also it was proper that B's suit was transferred to a Court at Poona where the other two suits were filed; [Para 12]

(5) the suit filed by B on the original side must, therefore, be transferred to the Court of the Civil Judge, Senior Division, Poona, and suit filed by A must also be transferred to the same Court and both suits must be heard and decided by that Court according to law. [Para 15]

Annotation: ('44-Com) Civil P. C., S. 24 N. 13 Pts. 1, 3 & 4.

H. C. Coyajee and K. B. Sukthankar—for Applicant.

S. R. Parulekar—for Opponent.

Dixit J.—This is an application for transfer of a suit, and in order to understand the nature of the application it is necessary to mention some introductory facts. Those facts as recited in the application are as follows:

[2] The petitioner is a resident of Nagpur, while the opponent resides at Poona. On 17th October 1942, an agreement was executed in Bombay by five persons including the opponent and that agreement was accepted by the petitioner. On 5th July 1946, the petitioner filed a Suit No. 820 of 1946, in the Court of the Civil Judge, Junior Division, Poona, claiming a certain declaration and an injunction—a declaration that the opponent had no right to say that Rs. 10,000 were deposited with the petitioner and an injunction restraining the opponent from demanding Rs. 10,000 and from filing a suit against the petitioner for the same. It appears that this application was supported by an affidavit which was declared on behalf of the petitioner as long ago as 7th December 1946, though the application came to be filed on the date 1st April 1947. On 24th September 1946, the opponent filed a summary Suit No. 1920 of 1946, against the petitioner on the original side of this Court claiming to recover a sum of Rs. 10,000 under the writing dated 17th October 1942. Prior to the filing of the suit the opponent had given notice to the petitioner on 2nd August 1945, asking for the return of the amount in question and this notice was followed by another

notice which was given by him on 29th June 1946, in which the opponent made a demand for the said amount, to which the petitioner also gave no reply. It will, therefore, be apparent that the petitioner's suit was filed after the two notices referred to above and the opponent's suit was filed thereafter in September 1946.

[3] It appears that a person of the name of Bavdekar who is also one of the five persons who executed the above agreement in Bombay in 1942 also filed a suit No. 1098 of 1945, against the petitioner in the Court of the Civil Judge, Junior Division, Poona.

[4] The application now made is that Suit No. 1920 of 1946, pending on the original side of this Court should be transferred to a Court at Poona and competent to try the suit. The question, therefore, arises whether we should grant the application as prayed for.

[5] It is obvious that if Suit No. 1920 of 1946 is to be transferred to a Poona Court, it ought to be transferred to the Court of the Civil Judge, Senior Division, and not to the Court of the Civil Judge, Junior Division, because the amount which the opponent claims at Bombay is a sum of Rs. 10,000 and the Court of the Civil Judge, Junior Division, has no pecuniary jurisdiction to try a suit for that amount. However, we shall have to consider whether we should transfer Suit No. 1920 of 1946, in order that that suit may be heard along with Suit No. 820 of 1946 filed by the petitioner in Poona.

[6] The present application has been made under S. 24, Civil P. C., and if we are disposed to transfer Suit No. 1920 of 1946 pending on the original side of this Court to the Court at Poona, we must transfer it to the Court of the Civil Judge, Senior Division. That we can do having regard to the language of S. 24 of the Code. That this Court has power to make the order in the sense applied for is, I think, beyond dispute. There is abundant authority for the view that a Bench on the appellate side can transfer a suit pending on the original side of this Court to a Court in the mofussil. But the Court must be satisfied that such a transfer is necessary. In this connection reference may be made to the decision in *Narayan Vithal Samant v. Jankibai Sitaram Vithal Samant*, Civil Appln. No. 55 of 1915 D/- 11th August 1915 by Scott C. J. and Batchelor J., to the decision in *Lachmandas Tulsidas v. The Buckingham & Carnatic Co. Ltd.*, Civil Appln. No. 672 of 1939 D/- 17th January 1940 by Broomfield and Macklin JJ. and also to the decision in *Gopal Pandharinath Sulakhe v. Lokamanya Mills Barsi, Ltd.*, Civil Appln. No. 1532 of 1945 D/- 17th April 1946 by Bavdekar and Dixit JJ. Indeed the learned advocate on behalf

of the opponent does not dispute the position that this Court has got that power.

[7] It only remains, therefore, to consider the question whether the facts of the case justify us in making the order in question. At the outset it is to be borne in mind that both the Poona and the Bombay suits (in this judgment I shall, for the sake of convenience, refer to the suits as Poona and Bombay suits) involve consideration of the agreement of 17th October 1942. They also involve the true construction of that agreement, and it is desirable that the question should be decided by one Court instead of by two Courts. That this is desirable will be apparent from the fact that if the two suits involving the construction of the same agreement are allowed to go on in two different Courts, it is likely that the two Courts may come to different conclusions on the construction of the same agreement. It is most desirable to avoid that result. That is a consideration in favour of the order of transfer. As against that, several considerations have been pointed out on behalf of the opponent.

[8] In the first place it is said that the suit which has been filed by the petitioner at Poona is not a *bona fide* suit. It is said that the opponent gave the petitioner notices in 1945 and in 1946 and certain negotiations were in progress between the petitioner and opponent as regards the repayment of the amount of Rs. 10,000; but all of a sudden the petitioner chose to file a suit in Poona on 5th July 1946. There is some force in this contention. But that circumstance is not, in our opinion, decisive. It often happens that negotiations are in progress between the parties for the settlement of the dispute outstanding between them and not unoften they end without any settlement being made. The more substantial point which has been urged against the application is the contention that the suit which the petitioner has filed in Poona is not maintainable, that it is not *bona fide* and that accordingly an order of transfer should not, therefore, be made. The learned advocate on behalf of the opponent has relied upon a number of authorities upon that point such as *Ramkrishna v. Narayana*, 39 Mad. 80 : (A. I. R. (2) 1915 Mad. 584), *Gopal Das v. Mul Raj*, A.I.R. (24) 1937 Lah. 389 : (173 I. C. 444) and *Shripatrao v. Shankarrao*, 32 Bom. L. R. 207 : (A.I.R. (17) 1930 Bom. 331). The contention is that a suit of the nature filed by the petitioner under S. 42, Specific Relief Act, is not maintainable inasmuch as it is a suit based upon a contract and that accordingly an order of transfer as prayed for should not be made. If that question is to be decided now, there is an end of the matter, but surely it is not desirable to decide that point at this stage, because if we decide the point now, it will prejudice the peti-

tioner in the pursuit of his remedy to which he is entitled. If the point has any importance it is only from this point of view that the suit which the petitioner has filed at Poona is or is not *bona fide*. It is to be remembered that the petitioner is a resident of Nagpur. The opponent is a resident of Poona. And the agreement was executed in Bombay. The opponent was justified in bringing the suit on the original side of this Court, and if the petitioner chose to bring his suit in Poona where the opponent resides, it can hardly be suggested that his suit is not *bona fide*. That the suit is or is not maintainable is at this stage clearly irrelevant. We are not, therefore, satisfied that merely because the suit is contended to be not maintainable is by itself a sufficient ground for refusing the application.

[9] The next contention taken on behalf of the opponent is that the learned Civil Judge, Junior Division, has held in an order which he made upon an interlocutory application that the suit is not maintainable. That again is a matter with which we are not concerned at the moment. What the petitioner did was that he applied for a temporary injunction in his suit and the learned Civil Judge while dealing with that application had incidentally to consider the question about the maintainability of the suit. He actually refused that application and it appears that from that order refusing the temporary injunction an appeal has been filed in the District Court and that the said appeal is pending. It is urged on behalf of the opponent that it is manifest from the order of the learned Civil Judge that the suit is not maintainable and that, therefore, we should now hold that this transfer is uncalled for. We are again not prepared to accede to that argument.

[10] It is also pointed out that the petitioner's proper remedy was to make an application to this Court for stay of Suit No. 1920 of 1946 under S. 10, Civil P. C. That it was open to the petitioner to make such an application cannot be disputed. But merely because he did not make such an application it does not follow that we should, therefore, refuse his present application. In this connection we are again not satisfied that we should refuse the petitioner's application on the ground urged by the learned advocate on behalf of the opponent.

[11] The real question to consider is whether the opponent should be deprived of the forum which he has chosen for vindicating his right. That a plaintiff is entitled to file his suit in a Court of his choice which has jurisdiction to try it can hardly be open to objection and it is not suggested on behalf of the petitioner that the opponent could not have filed the suit in Bombay. At the same time it can hardly be disputed that

the petitioner could as well file a suit in the Court of his choice and in this instance he has filed the suit at Poona where the opponent resides. But while a plaintiff is entitled to file his suit in a forum of his choice, it must be recognised that the Court should be slow in changing the forum and in compelling the plaintiff to go to another Court and thereby expose him to unnecessary expenses of litigation. It is said that if suit No. 1920 of 1946 is transferred to the Court at Poona, the opponent will have to pay *ad valorem* court-fee upon the amount claimed by him, whereas he is not compelled to do so if the suit is filed in Bombay, which he has done and that it would take a longer time for the suit to be decided in Poona than would be the case if the suit is heard in Bombay. The question of expenses is, I think, a material consideration, and if a party chooses to compel his opponent to go to another Court, the Court has to see that the person against whom the order is to be made is not prejudiced. But in this case it is not clear as to whether the expenses will be greater at Poona than they will be in Bombay. It may be that the Court costs may be less in Bombay. As regards the time which will be taken up for the hearing of the suit, that again depends upon various factors such as the arrears accumulated in the Court, and in our opinion that again is not a decisive consideration.

[12] The question of convenience is a matter to be considered. It is not decisive though it is a relevant consideration. From this point of view it is a point in favour of the petitioner that the opponent resides at Poona, so that it is a matter of some convenience to him, if the suit is heard at Poona, though he cannot be compelled to have his suit heard at Poona, if he can file his suit in Bombay. But the main consideration which, we think, is decisive of this matter is the fact that there are three different suits brought by the petitioner, by the opponent and by Bavdekar. The petitioner's suit is in Poona; the opponent's suit is in Bombay and Bavdekar's suit is also filed in Poona, and if all these three suits involve the consideration and the true construction of the agreement of 17th October 1942, it is, we think, a more desirable course to adopt if all these three suits are heard by the same Court. The present application seeks only to have the Bombay suit transferred to the Poona Court and there is no application for the transfer of Bavdekar's suit. We are told that that suit has been filed in the Court of the Civil Judge, Junior Division, and that that Court has made an order returning the plaint for presentation to the proper Court and it is said that the proper Court is the Court of the Civil Judge, Senior Division. If the order prayed for is not made,

the result will be that the petitioner's suit will be heard at Poona; the opponent's suit will be heard in Bombay and Bavdekar's suit will be heard in Poona either by the Court of the Civil Judge, Junior Division, or by the Court of the Civil Judge, Senior Division. It is necessary to emphasize that this is, in our opinion, not a very satisfactory way of dealing with the suits if it is possible to make an order by which the suits will be heard by the same Court. It is from that point of view that we are disposed to make an order in favour of the applicant.

[13] On behalf of the opponent Mr. Parulekar has cited the case in *Geffert v. Rukchand Mohla*, 13 Bom. 178, and relying upon the observations at p. 182 he contends that the petitioner's suit is vexatious. Whether that is so or not will be decided at the hearing of the suit and on the merits of the dispute between the parties. But we think that on the whole the most material consideration is to appreciate the fact that since all the three suits arise out of the same agreement of 17th October 1942, it is not only necessary but desirable that the same Court should be seized of the three suits and should dispose of them according to law. As I have already stated, we are not at present making any order in regard to Bavdekar's suit. But as that suit is referred to during the course of the argument at the Bar, we have thought it fit to make reference to it.

[14] As already stated, the applicant has preferred an appeal in the District Court against the order of the trial Court refusing the temporary injunction. As we are now disposed to make an order of transfer as applied for by the petitioner, it would be desirable for the applicant to withdraw his appeal because in view of the order of transfer that appeal becomes really unnecessary.

[15] We, therefore, make the rule absolute and direct that suit No. 1920 of 1946 pending on the original side of this Court be transferred to the Court of the Civil Judge, Senior Division, Poona, that suit No. 820 of 1946 pending in the Court of the Civil Judge, Junior Division, be transferred to the Court of the Civil Judge, Senior Division, Poona, and that both the suits should be heard and decided by the Court of the Civil Judge, Senior Division, Poona, according to law. As regards costs, we think that the fair order will be that the applicant should pay the opponent's costs of this application.

D.H.

*Rule made absolute.***A. I. R (36) 1949 Bombay 266 [C. N. 73.]**

CHAGLA C. J. AND GAJENDRAGADKAR J.

Vishnu Ramkrishna and others — Plaintiffs — Appellants v. Nathu Vithal and others — Defendants — Respondents.

First Appeal No. 191 of 1944, Decided on 10th August 1948, from order of Civil Judge (Senior Division), Jalgaon, in Special Suit No. 10 of 1943.

(a) Evidence Act (1872), Ss. 68 and 71 — Compliance with—Witness called to prove execution of will not in position to prove attestation by other witness — Requirements of S. 68 not fulfilled—One attesting witness not able to prove execution—Other attesting witness available but not called — S. 71 not applicable.

Although the Succession Act requires that a will has to be attested by two witnesses S. 68 permits the execution of the will to be proved by only one attesting witness being called. The execution of the will does not merely mean the signing of it by the testator or putting his thumb impression on the document but it means all the formalities required and laid down by S. 63, Succession Act. Where the attesting witness who is called to prove the execution is not in a position to prove the attestation of the will by the second witness, the evidence of the witness called falls short of the mandatory requirements of S. 68. In such a case the evidence of the witness must be supplemented by the other attesting witness being called to prove the execution. [Para 6]

Section 71 is a safeguard introduced to S. 68 where it is not possible to prove execution of a will by calling attesting witness though alive. The section can only be requisitioned when the attesting witnesses, who have been called fail to prove the execution of the will by reason of either their denying their own signatures or denying the signatures of the testator or having no recollection as to the execution of the document. The section has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses are available who could prove the execution if they were called: A. I. R. (33) 1946 Bom. 12, *Foll.*; *Case law referred.* [Para 7]

Annotation: ('46-Man.) Evidence Act, S. 68, N. 8; S. 71, N. 1.

(b) Civil P. C. (1908), O. 41, R. 27 — Propounder of will negligently not complying with requirements of S. 63, Succession Act—High Court in appeal can call for necessary evidence.

In dealing with the case of a will the High Court in appeal has to approach the problem as a Court of Conscience. The High Court must be satisfied whether the document put forward is the last will and testament of the testator. If the High Court finds that the wishes of the testator are likely to be defeated or thwarted merely by reason of want of some technicality the High Court as a Court of conscience would not permit such a thing to happen. The mere fact that the propounders of the will are negligent and grossly negligent in not complying with the requirements of S. 63, Succession Act, and proving the will, should not deter the High Court from calling for the necessary evidence in order to satisfy itself whether the will was duly executed or not. [Para 15]

Annotation: ('44-Com.) C. P. C., O. 41, R. 27 N. 8.

K. N. Dharap, S. G. Patwardhan and M. M. Virkar — for Appellants.

R. B. Kotwal (for Nos. 1 and 3) and V. R. Gadkari for B. N. Gokhale (for No. 2) and A. G. Desai (for No. 3) — for Respondents.

Chagla C. J. — This appeal arises out of a suit filed by the plaintiffs for possession of certain properties, and in order to appreciate the contentions of the parties it is necessary to set out a pedigree which will explain the relationship of the parties necessary to understand the material questions.

[2] One Shivram had three sons: Narayan, Hari and Ramkrishna. Narayan had a son Madhav who died in 1936 and his sons are Murlidhar and Vasudev. Hari was married to Gangabai and Hari died on 22nd March 1927. Gangabai died on 22nd July 1941. Hari and Gangabai had one issue, a daughter Narmadabai who died in 1935. She was married to Nattu, who is defendant 1 in the suit. Ramkrishna died in 1939 and his widow is Gitabai, and Ramkrishna had three sons: Vishnu, Laxman and Ramchandra, who are plaintiffs 1, 2 and 3. Narayan, Hari and Ramkrishna separated a long time ago. Gangabai made a will on 14th July 1941, and by that will she disposed of the property in suit by giving a part of it to defendant 1, another part of it to defendant 2, who was a distant relation of Hari, and the third part to charity, appointing defendants 1 and 2 as trustees of that charity. Defendant 3 is a purchaser of defendant 1's share in the property which he claims under the will of Gangabai. The defendants in answer to the plaintiff's claim for possession of the property in suit set up Gangabai's will and the trial Court held that Gangabai's will was proved, that under the will defendants 1 and 2 and charity were legatees and that the plaintiffs were not entitled to succeed in the suit which they had brought. From that decision the plaintiffs have come in appeal before us and various points have been raised by Mr. Dharap on behalf of the plaintiffs.

[3] The first contention is that under the will of Hari dated 5th May 1926, Hari constituted Gangabai merely a limited owner of the property in suit and Gangabai had no right to dispose of this property. If that contention were sound, then on Gangabai's death the plaintiffs would succeed to the property as the next reversioners of Hari. In order to test this contention we must look at the provision of the will of Hari. In cl. 5 of that will Hari states that on his death his wife Gangabai was to be the owner of the property and excepting her no other person should have any right or interest over the said property. He then expressly excludes his brothers, nephews or other heirs from claiming any right, title or interest to the property. The testator then repeats and reiterates what he has already stated and he says that after his death his wife should enjoy the property as owner thereof and should be the absolute owner and she would

be fully entitled to dispose of or transfer the same. Mr. Dharap has relied on one provision in this clause which comes subsequently, which according to him makes it clear that the intention of Hari was not to make his wife the absolute owner of the property and that provision is with regard to his daughter Narmadabai. The testator provides in the will that if there remained any property after the death of his wife, her daughter Narmadabai should be the owner thereof. But he goes on to say that if, per chance, the order of death of the three persons, namely himself, his wife and his daughter, should be changed, then the survivor of these three shall deal with this property as owner thereof and shall be owner thereof. Whatever might have been the position if Narmadabai had survived her mother, the position is clear when we look to the circumstances prevailing on the death of Gangabai. The will of Gangabai only begins to speak at her death and at her death her daughter was not alive, and it is clear from the provisions of her husband's will that she being the survivor of herself, her husband and her daughter, her husband intended that she should be the absolute owner of the property. Therefore, at her death she had full power to dispose of her property as she wished, and we do not agree with Mr. Dharap's contention that the will of Hari read as a whole constituted his wife merely a limited and not an absolute owner.

[4] Then Mr. Dharap wanted to raise two contentions with regard to the will itself, assuming that Gangabai was the absolute owner and capable of disposing of the property. Mr. Dharap contended, in the first place, that Gangabai did not have a sound and disposing mind, and, secondly, that the due execution of the will had not been established. We have not heard Mr. Dharap on the first point. Having heard him for some time on the second point we have come to the conclusion that this is a case where it is essential that further evidence should be placed before the Court and therefore we have decided to remand the matter back to the trial Court. The reasons which have led us to this conclusion are these :

[5] The will is alleged to have been executed by Gangabai by her putting her thumb impression on the will, and the execution is attested by four attesting witnesses : Dr. Amrit D. Pillay, Onkar Lahanu, Laxman Sonu Wani and Vishnu Nathu Wani. The defendants, in support of the will, only examined one of these four attesting witnesses, and that was Dr. Pillay. It is not disputed that the other three attesting witnesses are alive and are subject to the process of the Court. It is also not disputed that as a matter

of fact one of them, viz., Onkar Lahanu, was actually subpoenaed by the defendants, was present in Court for a long time and was still not examined. Mr. Dharap's contention is that the only attesting witness Dr. Pillay, assuming his evidence is to be accepted in toto, does not prove the due execution of the will, and the evidence with regard to the execution of the will cannot be supplemented by other evidence which the defendants have called. For instance, they have called the evidence of defendants 1 and 2 themselves and also the evidence of the writer. But Mr. Dharap's contention is that it is not open to the Court to travel outside the evidence of Dr. Pillay, the attesting witness, in order to come to the conclusion whether the will has been duly executed or not. We have got to look to S. 63, Succession Act, in order to ascertain what the Legislature intended to be the due execution of a will. Section 63 requires proof of three things mentioned in sub-cl. (a), (b) and (c) of that section before it can be said that a will has been duly executed. The first is that the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction. The second is that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document was intended to have effect as a will, and the third, which is the most important and with which we are concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the will, or must have seen some other person sign the will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of the witnesses has to sign the will in the presence of the testator. And then the section makes a departure from the English law, viz., that it is not necessary that the witnesses should sign in the presence of each other. Turning to the evidence of Dr. Pillay which has been recorded by the trial Court, Dr. Pillay says that he went to the house of Gangabai after she had placed her thumb mark on the will, and when he came near her she acknowledged before him that the thumb mark on the document was hers. He also says that Onkar Lahanu, one of the attesting witnesses, was there when he arrived. From this evidence it is clear that as far as his own attestation is concerned, he has proved it as required by S. 63. Although he did not see Gangabai put the thumb impression on the document, she acknowledged it in his presence

and he signed the will in the presence of the testatrix. But the difficulty arises with regard to the second attestation. As far as Onkar Lahanu is concerned all that this witness is in a position to say is that he was present near Gangabai when he came there. He has not seen Onkar Lahanu seeing the testatrix put the thumb impression. He cannot depose to the fact that Gangabai acknowledged to Onkar Lahanu that the thumb impression was hers. He is not in a position to say that Onkar Lahanu signed the will in the presence of the testatrix. Therefore, it is clear that reading only the evidence of Dr. Pillay all that he established is that the will was attested by him only. The attestation of the second witness is not established by him and, therefore, if the evidence with regard to attestation was to be confined to the evidence of Dr. Pillay, one of the important factors necessary to be established for the due execution of the will, viz. attestation by two witnesses, would be absent in this case. Mr. Desai for the respondent argues that there is ample evidence on the record which will satisfy the Court that the other witnesses attested the will in the manner required by the law, and the question that we have got to consider is whether it is open to the Court to consider other evidence for the purpose of satisfying itself that the will was attested by two witnesses.

[6] Section 68, Evidence Act, provides that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Therefore, S. 68 makes an important concession to those who wish to prove and establish a will in a Court of law. Although the Indian Succession Act requires that a will has to be attested by two witnesses, S. 68 permits the execution of the will to be proved by only one attesting witness being called. But it is important to note that at least one witness should be in a position to prove the execution of the will. If that attesting witness can prove the execution of the will, the law dispenses with the evidence of the other attesting witness. But if that one attesting witness cannot prove the execution of the will, then his evidence has to be supplemented by the other attesting witness being called to prove the execution. In this case the one attesting witness who has been called, and he is the only attesting witness, Dr. Pillay, does not prove the execution of the will. The execution of the will does not merely mean the signing of it by the testatrix or putting her thumb impression on the document, but it means all the formalities required and

laid down by S. 63, Succession Act, and, as we have already pointed out, Dr. Pillay is not in a position to prove the attestation of the will by the second witness, and, therefore, the evidence of Dr. Pillay falls short of the mandatory requirements of S. 68, Evidence Act.

[7] In this connection our attention was drawn to S. 71, Evidence Act. It provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. This is a sort of a safeguard introduced by the Legislature to the mandatory provisions of S. 68, where it is not possible to prove the execution of the will by calling attesting witnesses, though alive. Section 71 can only be requisitioned when the attesting witnesses who have been called fail to prove the execution of the will by reason of either their denying their own signatures, or denying the signature of the testator, or having no recollection as to the execution of the document. Section 71, in our opinion, has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses are available who could prove the execution if they were called. In any case, on the facts that we have before us there is no question of any attesting witness denying or not recollecting the execution of the document. The difficulty with Dr. Pillay's evidence is that he can only speak to a part of the execution of the document. He cannot depose to all the formalities which go to constitute the execution of a will.

[8] In this connection S. 69, Evidence Act, may also be looked at. That provides for cases where no attesting witnesses can be found and then the Legislature provides for proof of the will by proving the handwriting of one of the attesting witnesses and the signature of the executant of the document to be in the handwriting of that person.

[9] Mr. Desai's contention is that S. 68 does not rule out supplementary evidence in case the one attesting witness who has been called does not succeed in speaking to all the ingredients which go to make the due execution of the will. Mr. Desai says that the only mandatory provision of S. 68 is that one attesting witness has to be called, and according to him once that has been done, any lacuna in the evidence can be filled up by calling witnesses other than the attesting witnesses. We cannot accept that contention. The whole principle underlying S. 68 is that execution of the will must be proved by at least one attesting witness, that it is only an attesting witness who is entitled to prove the execution of the will. As we have pointed out, it is a concession that the Legislature has made, and if that concession does not result in complying with the

mandatory requirements of S. 68, then the only proper method is to call the other attesting witness so that both the attesting witnesses are before the Court and the due execution of the will is proved by the two attesting witnesses which are necessary before a will can become a valid document.

[10] The rule of English law is also the same. To prove the attestation of a will in the Court of Probate, it is not necessary to examine both attesting witnesses. But a party propounding a will is bound to call at least one of the attesting witnesses, if he can be produced, to prove due execution, and, if such witness fails to prove due execution, he is bound to call the other, although he may know him to be an adverse witness: (see *Mortimer on Probate*, Edn. 2, p. 267). Therefore, the rigour of the law in England has gone to this length that the duty is cast upon the party propounding the will to call the other attesting witness in case the first witness is not sufficient to prove the execution of the will even if that witness happens to be an adverse witness, and it is only then when the second witness has been called and he turns out to be hostile that the right arises of leading other evidence. This principle is based on the leading case of *Coles v. Coles and Brown*, (1866) L. R. 1 p. 70 : (35 L. J. p. 40).

[11] Our attention was drawn to the decision of the Calcutta High Court in *Ayenati Shikdar v. Md. Esmail*, A. I. R. (14) 1927 Cal. 441 : (122 I. C. 554) where a Bench of Jack and Mitter JJ. held contrary opinions with regard to the very point which we are considering. According to Jack J. where out of two attesting witnesses one is produced but turns hostile, other evidence becomes admissible under S. 71, and the plaintiff is not bound to produce the other, though alive, whom there are grounds to believe to be hostile. But according to Mitter J. it was not intended by enacting S. 71 to differ from the rule of English law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness was satisfactorily explained in the case where one of the two attesting witnesses had been called and had denied execution. With very great respect, we prefer the view taken by Mitter J., but we may point out that really the facts of this case are very different from the facts Jack and Mitter JJ. were considering. In our opinion S. 71 has no application at all because this is not a case where Dr. Pillay has turned hostile or has stated that he has no recollection as to the execution of the document. It is only in those two cases that S. 71 has any application.

[12] In *Murari Lal v. Muhammad Samiuddin Ahmed Khan*, A. I. R. (24) 1937 ALL. 273 :

(168 I. C. 988) a Divisional Bench of the Allahabad High Court, Thom and Allsop JJ. held that there was nothing in the Evidence Act to preclude a person from adducing as witness to the execution of the deed any person who happened to be present when the deed was executed and actually saw it signed by the executant and by the attesting witnesses. According to these learned Judges, S. 71 was merely permissive in character and did not render other evidence which was relevant and admissible evidence inadmissible. With very great respect, it is true that S. 71 is a permissive and enabling section and permits a party to lead certain kind of evidence under certain circumstances. But what we have to consider is not so much S. 71 as the mandatory provisions of S. 68. Section 68 is certainly not permissive or enabling. It lays down the necessary requirements which the Court has to observe in order that a document can be held to be proved.

[13] There is an earlier decision of the Allahabad High Court in *Shib Dayal v. Sheo Ghulam*, 39 ALL. 241 : (A. I. R. (4) 1917 ALL. 103). In that case the question was as to the execution of a mortgage-deed, and this mortgage-deed was attested by a large number of witnesses. One attesting witness only was called and he proved that he saw the mortgagor sign the mortgage and that he himself signed his name as an attesting witness. The other witnesses were not called, nor did the witness who was called say that any other attesting witness was present. On that the Court held that in the absence of any rebutting evidence, the mortgage-deed must be considered to be sufficiently proved. In coming to this conclusion the learned Judges relied on an earlier decision of that very Court in *Uttam Singh v. Hukam Singh*, 39 ALL. 112 : (A. I. R. (4) 1917 ALL. 89). With very great respect to the learned Judges of the Allahabad High Court, they seem to have overlooked the fact that the decision on which they were relying was really based on S. 69, Evidence Act; because in that case the executant and all the attesting witnesses to a mortgage were dead and it was held that the mortgage deed was sufficiently proved by proving the signature of the mortgagor and the signatures of two of the attesting witnesses. Again with very great respect, this decision, viz. *Uttam Singh v. Hukam Singh*, 39 ALL. 112 : (A. I. R. (4) 1917 ALL. 89) is nothing more than merely the enunciation of the very language and words used by S. 69, Evidence Act.

[14] Then we have a decision of our own Court which is directly in point and that is *Roda Framroze v. Kanta Varjivandas*, 47 Bom. L.R. 709 : (A. I. R. (33) 1946 Bom. 12). That was a case of a will and it was duly signed by the

testator and attested by two witnesses and only one attesting witness was called to prove the will. Kania J. (as he then was) who tried the case on the probate side held that even if the evidence of the one attesting witness was accepted in full, it did not satisfy the requirements of S. 63 because there was no evidence that the alleged second witness was present when the testator executed the document or had received from the testator a personal acknowledgment of his signature. On that ground Kania J. dismissed the petition. The matter went to the Court of Appeal consisting of Sir Leonard Stone, C. J., and Divatia J., and the Court of Appeal confirmed the decision of Kania J. Divatia J. points out (p. 715) :

"Reading S. 63, Succession Act, with S. 68, Evidence Act, it seems to me to be clear that what the person propounding the will has got to prove is that the will was duly and validly executed and that must be done by not simply proving that the signature on the will was that of the testator but that the attestations were also properly made as required by cl. (c) of S. 63. No doubt S. 68, Evidence Act, says that it is not necessary to examine both or all the attesting witnesses, but it does not follow therefrom that if one attesting witness only proves that the testator had acknowledged his signature to him, it is not necessary that the acknowledgment by the testator before the other attesting witness need be proved. All that it means is that if two attesting witnesses had signed in each other's presence, it is not necessary to examine both of them to prove that they had received the acknowledgment from the testator."

In our opinion, therefore, as the record stands, the defendants have failed to prove the due execution of the will as required by S. 68.

[15] The next question that we have to consider is what order we should make in view of this finding of ours. Mr. Dharap strenuously argues that the duty of propounding the will was on the defendants. Although all the attesting witnesses were available to them they chose only to call one and they should not be given an opportunity to make up the lacuna in the record by leading further evidence. We are dealing with the case of a will and we must approach the problem as a Court of Conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a Court of Conscience would not permit such a thing to happen. We have not heard Mr. Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent—and grossly negligent—in not complying with the requirements of S. 63 and proving the will as they ought to have,

should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not. In this case there is an additional consideration why we should exercise our powers under O. 41, R. 27. One of the legatees, as we have pointed out earlier, under the will is charity, and if the will is held not to be proved, charity would be defeated. Therefore, this is clearly a case where the Court would require additional evidence which is available in order to satisfy itself and satisfy its conscience whether in fact the will was duly executed or not. We, therefore, reverse the finding of the learned Judge as to the due execution of the will and send back this case for the learned Judge to give a proper finding after considering not only the evidence already led and which forms part of the record, but also considering such other evidence as the defendants may lead on the question of the due execution of the will. Such evidence must be confined to the three attesting witnesses who are available and have so far not been called. Under certain eventualities it may be open to the defendants to call evidence beyond these three attesting witnesses. As pointed out in "Mortimer on Probate" (p. 268):

"If an attesting witness called by a party propounding the will gives evidence against the will, such party may cross-examine him, and may call evidence to disprove such of the facts stated by the witness as are material to the issue, and to prove that he has made statements inconsistent with his evidence, although he denies having made such statements, and is not a hostile but merely an adverse witness; for such a witness is not the witness of either party, but of the Court."

This clearly shows that at this stage S. 71, Evidence Act, would apply, and if in this case the defendants find that the attesting witnesses give evidence against the will and they want to disprove their evidence, it would be open to them to lead evidence to disprove such evidence given by the attesting witnesses. After considering the evidence the learned Judge will give his finding and send the matter back to us for our consideration within three months from the receipt of the record in the lower Court.

[16] With regard to costs, there is no doubt that defendants ought to have put before the Court all the evidence available, especially as the will was strongly contested and also because the defendants were responsible for the making of the will and were taking benefit under the will. We have not dealt with that aspect of the case; but it was certainly their duty to do everything in their power to remove the suspicion of the Court which is naturally aroused when the maker of a will takes benefit and propounds that document. We think the fairest order to make would be that the defendants should pay

the costs of the plaintiffs of this appeal in any event. The costs of the suit will abide by the final decision of this appeal.

D.H.

Case remanded.

A. I. R. (36) 1949 Bombay 271 [C. N. 74.]

JAHAGIRDAR J.

Goverdhan Das Kanhayalal—Defendant—Appellant. v. Ranchhoddas Bhikharilal—Plaintiff—Respondent.

First Appeal No. 29 of 1947, Decided on 7th July 1948, from order of Civil Judge, (Junior Division) Jalgaon, in Special Darkhast No. 110 of 1944.

Civil P. C. (1908), O. 21, Rr. 89 and 90—Application under R. 90, pending—Application under R. 89, subsequently made is liable to be dismissed—Mere stay of application under R. 89, until disposal of application under R. 90 not sufficient.

Where while an application under R. 90 is pending an application under R. 89 is made, the application under R. 89 is liable to be dismissed as not competent under R. 89 (2). The provisions of R. 89 (2) cannot be said to have been sufficiently complied with when the application is merely not proceeded with and is stayed until the disposal of the application under R. 90. *Case law referred.* [Para 14]

Annotation:—('44-Com.) C. P. C., O. 21 R. 89 N. 24 pt. 7.

G. A. Desai—for Appellant.

M. W. Pradhan—for Respondent.

Judgment.—This is an appeal filed by the judgment-debtor against the order dismissing his application to set aside the sale under O. 21, R. 89. The facts of the case are briefly these. The plaintiff obtained a mortgage decree and filed Darkhast No. 110 of 1944, to execute the decree. That decree was transferred to the Collector for execution. On 11th May 1946, the decree-holder purchased the property for Rupees 18,250. On 3rd June 1946, the defendant judgment-debtor applied to the Collector to set aside the sale under O. 21, R. 90, and on 8th June 1946, the judgment-debtor entered into an agreement with one Dhondiram for the sale of the property which had been sold in execution. One of the conditions was that Dhondiram was to deposit Rs. 19,500 in Court. This amount was deposited by Dhondiram on 8th June 1946, on behalf of the judgment-debtor. Then the judgment-debtor made the present application for setting aside the sale under O. 21, R. 89.

[2] The decree-holder contended that it is not competent to the judgment-debtor to file an application under O. 21, R. 89, as the amount is not deposited by him, and secondly, he contended that when an application under O. 21, R. 90 is pending, it was not competent to the judgment-debtor to make another application under O. 21, R. 89. Both these contentions found favour with the trial Court, with the result that the

application to set aside the sale stands dismissed. Against this order the defendant-judgment-debtor has come in appeal.

[3] If the case had been *res integra* there would not have been any difficulty in arriving at the conclusion. Paragraph 2 of O. 21, R. 89, reads thus:

"Where a person applies under R. 90, to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule."

[4] In this case it is admitted that on 3rd June 1946, an application for setting aside the sale under O. 21, R. 90, had been made and under the Civil Circulars that application to the Collector is treated as an application made to the Court within the meaning of O. 21, R. 90. So, an application under O. 21, R. 90, was pending when the present application for setting aside the sale under R. 89 was made. Now, sub-r. (2) of R. 89, in terms directs that where an application under R. 90, is made, no application under R. 89 can be made or prosecuted unless the application under R. 90, is withdrawn. So, looking at the wording of O. 21, R. 89 (2), I am inclined to hold that the learned Judge was right in dismissing the application. This construction of sub-r. (2) is supported by the case of *Seth Juharmal v. Ramdas-Baldeo Das*, A. I. R. (24) 1937 Nag. 161 : (168 I. C. 1003). There the facts were very similar to the facts in the present case. There the judgment-debtor whose property was attached and sold in execution of a decree on 8th April 1933, applied for setting aside the sale under O. 21 R. 90, on 21st April 1933, and subsequently he sold the property privately to a third person, who applied on 22nd April 1933, to set aside the sale under O. 21 R. 89. I might incidentally mention here that the person, who deposited the money could file an application in his own name for setting aside the sale under O. 21, R. 89 under the local amendment to R. 89. It was held that the application made by the purchaser from the judgment-debtor under O. 21, R. 89, was not competent as the application made by the judgment-debtor under O. 21, R. 90, was still pending. The material observations are at p. 162 :

"It was then argued that the lower Court should not have dismissed the application but should have put the applicant to election as was done in *Sarvi Begam v. Ramchandra Sarup*, 47 All. 850 : (A. I. R. (12) 1925 All. 778). It was urged that the stricter rule applied in *Kabiruddin v. Krishna Rao*, A. I. R. (15) 1928 Nag. 136 : (109 I. C. 449) may be permissible in some cases but the application is wrong. An election under R. 89 in that event would have to date from the date of which the application under R. 90 is actually accepted. The prohibition is express.

He shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

Therefore, no application can be entertained until the other under R. 90 has been withdrawn and it is for the applicant to do this and not for the Court. He cannot shift his responsibility to another."

[5] There is another decision of the Sind Court in *Rughunath Jethabhai v. Hariram Dipchand*, A. I. R. (27) 1940 Sind. 181 : (I. L. R. (1940) Kar. 360) which supports this view. It is a decision of a Division Bench consisting of Davis J. C. and Weston J. Here a composite application was made for setting aside the sale both under O. 21 R. 90, and under O. 21 R. 89. But the prayer for setting aside the sale under O. 21 R. 90, was mentioned first. The prayer to set aside the sale under R. 90 was supported by detailed allegations of irregularity, and the application further contained a prayer that it is only after the Court has refused to set aside the sale under R. 90, it should consider the application under R. 89. The application under R. 90, was therefore considered to be made first and that was not withdrawn till 23rd February when the learned advocate for the judgment-debtor abandoned his first prayer for relief under R. 90. Then it was argued that the application for setting aside the sale under R. 89 was already there and the Court should proceed with it. This contention was negatived and the Court held that :

"Rule 89 prohibits the making or prosecution of an application under R. 89 unless a previous application under R. 90 has been withdrawn, and as it prohibits the making, so it excludes an application already made."

Therefore the application under O. 21 R. 89, was not at all taken into consideration. This decision shows that the application made under R. 89 when the application under R. 90 was pending was not regarded as a valid application which could be taken into consideration. These two cases therefore support the construction which I am putting on R. 89 (2).

[6] Mr. Desai has invited my attention to certain observations of the Calcutta High Court and the Madras High Court which support the contentions of the appellant. The facts in *Gour Chand Mallik v. Pradyumna Kumar Mallik*, I. L. R. (1945) 2 Cal. 485 : (A. I. R. (32) 1945 Cal. 6) were that on 8th March 1943, the petitioner made an application for setting aside the sale under O. 21 R. 90, in para. 1 of that application. Then in paras. 3 and 4 he prayed that the sale should be set aside as he has deposited the amount as required by O. 21 R. 89. It was contended by the decree-holder that such an application was not competent. The learned Judge had framed three questions which will be found at p. 495 :

"(1) Was prayer (a) of the summons wholly based on rule 90 or was it based partly on rule 90 and partly on S. 47, Civil P. C.? In so far as it was not based on rule 90 did it attract the operation of R. 89 (2) ?

(2) Even if O. 21, R. 89, applied to prayers (c) and (d) (i. e. Paras. 3 and 4) must those prayers be withdrawn or dismissed *in limine* because the petitioner insists on going on with his application under R. 90 ? and

(3) Can prayers (c) and (d) be treated, if necessary as application under O. 34, R. 5, if there is any difficulty in applying O. 21, R. 89 ?"

[7] The reply to these questions was given by the Court at p. 501 :

"To summarise, I hold :

(1) that the application in so far as it seeks to set aside the sale on grounds not covered by O. 21, R. 90, may be combined with the application, in so far as it seeks to set aside the sale on payment of the requisite amount ;

(2) that if prayers (c) and (d) be treated as one under O. 21, R. 89, it need not be dismissed *in limine*, if the applicant does not withdraw his application under O. 21, R. 90, and that it will be sufficient to stay that part of the application until after the disposal of the other part of the application ;

(3) that this application, in so far as it seeks to set aside the sale on payment of the requisite amounts, may be treated as one substantially under O. 34, R. 5, also if O. 21, R. 89, fails and need not be dismissed *in limine*."

[8] After pronouncing this opinion, the learned Judge proceeded with the disposal of the case on merits and he set aside the sale under O. 21, R. 90, on account of the irregularities which were held to have been proved in the conduct of the sale. From this it would be clear that the question of proceeding with the application under O. 21, R. 89, was not present before the Court at all.

[9] Mr. Desai relies upon these observations at p. 498 :

"I am inclined to the view, for reasons stated above, that the requirements of sub-r. (2) of R. 89 are sufficiently complied with and satisfied if the application under R. 89 is not allowed to be 'made' or 'prosecuted,' i. e., actually moved or proceeded with and be stayed until the disposal of the application under R. 90 and it is not obligatory on the Court to dismiss it *in limine*."

[10] With great respect to the learned Judge, I do not agree with this view. The second question framed was this : Should the application under O. 21, R. 89, be withdrawn or dismissed *in limine* because the petitioner insisted on going on with his application under R. 90? That is not, however, R. 89 (2). Rule 89 (2) only directs that when an application under R. 90 is pending, an application under R. 89 cannot be made or proceeded with, and therefore the observations that have been made in the course of the judgment may be regarded as *obiter*, and there is another reason for holding that these observations are *obiter* because the Court came to the conclusion that the prayers for setting aside the sale in Paras. (c) and (d) need not be necessarily treated as an application under O. 21, R. 89, but they may be treated as an application under O. 34, R. 5, Civil P. C. It is, therefore, clear that this question did not fall to be considered by that

Court. The only question that was decided was that it is not necessary to dismiss the application under R. 89 before the hearing of the application under R. 90 is proceeded with. This case therefore is not a direct authority on this point.

[11] I might even add that the learned Judge does not seem to have considered an earlier ruling of a Division Bench of the same Court reported in *Rajendra Nath Haldar v. Nilaratan Mittra*, 23 Cal. 958. Though it is not a direct authority, there are some helpful observations. In that case, an application under S. 310, Civil P. C., was made to set aside the sale. The very next day another application under S. 311 was made for the same purpose. Before the application under S. 311 was disposed of, the judgment-debtor requested the Court to proceed with the application under S. 310A corresponding to O. 21, R. 89. His contention was that under the proviso to S. 310A, he was prevented from *making* an application and not from proceeding with the application which he had already made. This contention was not accepted. It was held that a person *makes* an application not only when he presents it, but also when he carries it on or "continues to make it." As a result of this case, the words "or prosecute" were added in O. 21, R. 89 (2) in the new Civil Procedure Code, 1908. It may be noticed that not only the word "make" is retained, but the word "prosecuted" is added. The intention of the Legislature appears, therefore, to be very clear. It prevented not only the making of the application but also prosecuting the same, when an application under O. 21, R. 90, is pending. This case, therefore, may be regarded as an authority for holding that no application under R. 89 can be presented when a similar application under R. 90 is pending.

[12] Then the next case which is relied upon by Mr. Desai is *Krishna Ayyar v. Arunachalam Chettiar*, 58 Mad. 972 : (A. I. R. (22) 1935 Mad. 842.) It is a judgment of the Full Bench. But the facts appear to be entirely different and the point under O. 21, R. 89 (2), was not considered. There the judgment-debtor applied to have the sale set aside under O. 21, R. 90. A few days later, the assignee of the judgment-debtor applied for setting aside the sale under O. 21, R. 89, by depositing the amount as provided by that rule. Later both the applications were allowed on the same day. The assignee of the judgment-debtor thereupon filed a suit to recover the amount deposited by him under R. 89. It was held that the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and, therefore, no suit would lie for its recovery.

[13] Here their Lordships assumed that an application under R. 89 can be made and pro-

ceeded with even though an application under R. 90 was pending, and then proceeded to consider the effect of setting aside the sale under R. 89 on the rights of the decree-holder and the person depositing the amount. I do not find any discussion as to whether the application under R. 89, which was admittedly filed by the assignee of the judgment-debtor a few days after the judgment-debtor had applied to set aside the sale under R. 90, was validly made and whether that application was rightly allowed. This case therefore cannot help the appellant.

[14] I, therefore, hold that the trial Court was justified in dismissing this application as not competent under O. 21, R. 89 (2). In this view, it is not necessary for me to consider the other ground for dismissing the application. The other ground was that the application has not been made by the person depositing the money in Court. But in the view I have taken of R. 89 (2), it is not necessary for me to decide that point. The result is that the appeal fails and is dismissed. There will be no order as to costs of this appeal.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 274 [C. N. 75.]

JAHAGIRDAR J.

Rajaram Maniram—Plaintiff — Appellant v. Jagannath Rawathmal—Defendant — Respondent.

Second Appeal No. 70 of 1945, Decided on 8th July 1948, from order of Asst. Judge, Nasik, in Appeal No. 309 of 1942.

Civil P. C. (1908), S. 11 — Might and ought — Suit by A for declaration that he owned certain property which was not liable for attachment and sale in execution of decree against B—B's contention that transaction in favour of A was bogus sale overruled and decree in favour of A — Subsequent suit by B against A under S. 15D, Dekkhan Agriculturists' Relief Act alleging that transaction in favour of A amounted to mortgage — Suit held barred by *res judicata*.

If the decree in a previous suit is inconsistent with the defence which ought to have been raised, that defence must be deemed to have been raised and finally decided and is barred by *res judicata*. [Para 3]

A brought a suit for a declaration that he was the owner of certain property and the same was not liable to be attached and sold in execution of the decree against B by others. B contended that the sale in favour of A was a bogus sale intended to defraud his creditors. The Court held that the transaction amounted to a sale out and out and that B had no interest whatsoever in the property which could be attached and sold in execution of the decree against him. This decision was confirmed in appeal by B by the High Court. Subsequently B filed a suit against A under S. 15D, Dekkhan Agriculturists' Relief Act alleging that the transaction was in fact a mortgage though in form a sale:

Held that the decision in the former suit operated as *res judicata* as the plaintiff's contention in the subsequent suit was inconsistent with the decision in the

earlier suit and must be held to have been raised and decided in that suit: 35 Bom. 507 and A. I. R. (9) 1922 Bom. 29, *Disting.*

[Para 3]

Annotation: ('44-Com), C. P. C., S. 11, N. 37.

R. B. Kotwal — for Appellant.

K. N. Dharap and M. M. Virkar — for Respondent.

Judgment.—This is an appeal by the plaintiff against the decision of the Assistant Judge at Nasik dismissing the suit. The few facts relating to the present dispute can be briefly stated. On 22nd August 1927, the plaintiff passed a sale deed in defendant's favour for Rs. 3,000. It is the plaintiff's case that though the transaction assumed the form of a sale-deed, it was in fact a mortgage. He has filed the present suit for accounts under S. 15D, Dekkhan Agriculturists' Relief Act, alleging that the transaction of 1927 was in fact a mortgage and that the consideration was only Rs. 1,700. The defendant contended that the present suit is barred by *res judicata* and that the transaction of 1927 was a sale out and out and that the consideration for the sale was Rs. 3,000 and not Rs. 1,700 as stated by the plaintiff in his plaint. The trial Court held that the suit is not barred by *res judicata* and that the transaction of 1927 was a mortgage and that the consideration for the mortgage transaction was only Rs. 1700. It, therefore, found that Rs. 2,320-12-0 are due to the defendant after taking accounts under the Dekkhan Agriculturists' Relief Act. Against that decree the defendant filed an appeal to the District Court at Nasik. The learned Assistant Judge who decided the appeal has held that the present suit of the plaintiff was barred by *res judicata* and that the transaction was a sale out and out and not a mortgage and that Rs. 3000 was a consideration for the sale deed, and in consonance with these findings the appeal was allowed and the suit was dismissed with costs. Against this decree the plaintiff has come in appeal.

[2] Now, Mr. Kotwal, the learned advocate for the appellant, contends that the decision of the appeal Court on issue 1 about *res judicata* is wrong. I have to state a few additional facts in order to understand the plea of *res judicata*. Other creditors of the plaintiff had obtained decrees against him and in execution of those decrees attached the present suit property as belonging to the present plaintiff alleging that the apparent sale of 1927 was in fact a mortgage. The present defendant applied on 30th November 1931, for raising the attachment. That application was, however, dismissed on 12th July 1932. The present defendant thereupon filed Suit No. 197 of 1934 in Sinnar Court praying for a declaration that he was the owner of the suit property and for a declaration that the properties are not liable to be attached and sold in execution of decrees of defendants 1 and 2 against defendant 3. Defen-

dants 1 and 2 were the other creditors of the present plaintiff and defendant 3 was the present plaintiff. The Sinner Court held that the valuation of the suit property was more than Rs. 5,000 and the suit was, therefore, transferred to the Nasik Court and it was re-numbered as Suit No. 425 of 1935. There the contention of defendant 3 who is the present plaintiff, was that the sale deed of 1927 was a bogus sale deed not intended to pass any title and that it was executed in order to defraud the creditors of defendant 3, without any consideration. In the trial Court several issues were raised, but issues 3 and 8 appear to be important. Issue 3 was: "Whether the plaintiff proves his title to the suit property" and issue 8 was: "Whether defendant 3 had any and what interest in the suit property when it was attached in Regular Darkkhast No. 290 and No. 470 by Sinner Court." The trial Court found that the transaction of 1927 was a sale out and out and that defendant 3 had no interest whatsoever in the suit property which could be attached and sold in execution of the decree against him. It further held that the then defendant 3 failed to show that it was a hollow sale deed. A decree was, therefore, passed in favour of the plaintiff. Defendant 3 i. e., the present plaintiff, preferred First Appeal No. 278 of 1937. There the findings of the trial Court were confirmed and the appeal was dismissed with costs. It appears that the counsel for defendant 3 applied for a remand to the trial Court alleging that defendant 3 had mortgagor's interest in the suit property. Their Lordships did not accede to the request and observed:

"This must necessarily negative any finding or issue on the basis of the sale deed having been a mortgage, for in the latter case, defendant 3 would have had obviously some interest left in the property—at least by way of the equity of redemption. Exhibit 5, the extract from the record of rights, supports the plaintiff's case. I am of opinion that (apart from the fact that neither side in this suit pleaded that the sale deed was a mortgage) there is enough oral and documentary evidence on the record to justify the finding of the learned trial Judge that the plaintiff had proved his title as owner and purchaser and that defendant 3 had no interest left in the properties at the date of the attachment."

So to me it appears that the High Court interpreted the judgment of the trial Court as holding by implication that defendant 3 had no interest left in the property at the date of the attachment, which must necessarily mean that the transaction was not even a mortgage. Their Lordships have also given reason for not remanding the case and that reason is that it was not raised in the trial Court. But in my opinion their Lordships expressed their opinion in clear terms that on the evidence before the trial Court, the learned Judge was justified in coming to the conclusion that defendant 3 had no interest left

in the suit properties at the date of the attachment.

[3] The trial Court in this suit held that the decision of the Nasik Court and the High Court would not operate as *res judicata* in the present suit on the ground that this defence could not have been taken in the earlier suit as it was destructive of the case set up in that suit. The learned Assistant Judge, however, has held that the decision in Suit No. 425 of 1935 and also in First Appeal No. 278 of 1937 would operate as *res judicata*, and I feel satisfied that the learned Assistant Judge was right in holding that the decision in the earlier suit operates as *res judicata*. It may be noted that the suit was not merely for a declaration that the plaintiff was the owner but it was also for a declaration that defendant 3 i. e., the present plaintiff, had no interest in the property whatsoever. Now, if it once be held that there was no saleable interest of the defendant, then any contention that may be raised now which would be inconsistent with that decision must be held to have been raised and decided in the earlier suit. The real test is that if the decree in the previous suit is inconsistent with the defence which ought to have been raised, that defence must be deemed to have been raised and finally decided and is barred by *res judicata*. Mr. Kotwal has referred me to a number of cases in which it has been held that though inconsistent pleas may be taken, it is not obligatory to take inconsistent pleas which would be destructive of each other. This proposition may be generally true provided it satisfies the test which has been laid down, viz., that the contentions raised in the second suit must not be inconsistent with the decision already given in the earlier suit. The cases referred to by Mr. Kotwal can all be distinguished on this ground. In *Mohomed Ibrahim v. Sheikh Hamja*, 35 Bom. 507: (12 I. C. 387), it has been held that "where a person brings a redemption suit and fails, his second suit in ejectment against the same defendant is not barred by *res judicata*." Here it may be seen that the decision in the redemption suit cannot be inconsistent with the claim made by the plaintiff that he is the owner. In the redemption suit, the mortgagor has only to prove the execution of the mortgage deed and the mortgagee is estopped from challenging the title of the mortgagor. So the question of title was never involved in the redemption suit but the question of title will be involved in a suit for ejectment. Therefore, the contention in the second suit is not inconsistent with the decisions in the first suit. Similarly in *Dola Khetaji v. Balya Kanoo*, 46 Bom. 803: (A. I. R. (9) 1922 Bom. 29), the facts were that the plaintiff sold the property in suit to the defendant on 16th March 1906. On 13th August 1906,

the defendant executed a *satekhat* to the plaintiff agreeing to re-sell the property to him on receipt of Rs. 395 from him any time within 12 years. In 1911 the plaintiff filed a suit claiming to redeem the property on the ground that the document of 16th March was a mortgage transaction. The suit was dismissed. The plaintiff, thereupon, sued for specific performance of the *satekhat*. It was contended that the claim was *res judicata* inasmuch as the plaintiff might have sued in the suit of 1911 for specific performance of the *satekhat*. The Court held that the suit was not barred as the two suits were mutually inconsistent, and if the plaintiff failed in proving the mortgage, he still had a number of years within which he could have sued to get back the property on payment of the consideration mentioned in the *satekhat*. So, though the earlier suit was for redemption and though it was dismissed, the suit under the *satekhat* was not inconsistent with the decision in the mortgage suit. I, therefore, hold that the present suit is barred by *res judicata* in view of the decisions of the Nasik Court in Suit No. 425 of 1935 and of the High Court in First Appeal No. 278 of 1937. In view of this finding on this issue, it is not necessary to consider the other issues.

[4] The appeal, therefore, fails and is dismissed with costs.

D. H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 276 [C. N. 76.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Abdullamiya Hamdumiya — Appellant v. Mahomedmiya Gulamhusein and others — Respondents.

First Appeal No. 83 of 1944, Decided on 26th July 1948, from order of Joint Civil Judge (Senior Division), Ahmedabad, in Special Suit No. 34 of 1943.

Civil P. C. (1908), O. 41, R. 22 (4) — Appeal abating by reason of appellant's death and his legal representatives not having been brought on record within limitation — Cross-objections of respondent cannot be heard.

When the appeal has abated by reason of the death of the appellant and his legal representatives not having been brought on the record within limitation, the respondent has no right to have his cross-objections heard, even if he has brought the heirs of the deceased appellant on the record for the purpose of his cross-objection. In such a case O. 41, R. 22 (4) does not provide for the hearing of the cross-objections. [Para 3]

Annotation: ('44-Com.) Civil P. C., O. 22 R. 3 N. 23; O. 41 R. 22 N. 8.

N. C. Shah — for Respondents 2 and 3.

Chagla C. J. — This appeal has abated as the appellant died and the legal representatives have not been brought on record within the time prescribed by the law of limitation. Mr. Shah's clients have filed cross-objections to the appeal

and Mr. Shah contends that although the appeal has abated, he has a right to have his cross-objections heard since he has brought the heirs of the appellant on the record for the purpose of his cross-objections.

[2] Now, the provision with regard to the hearing of cross-objections is to be found in O. 41, R. 22, and in order to understand and appreciate the present position in law one must look at the history of legislation as contained in this particular rule. Under the old Code of 1882, S. 561 contained the corresponding provisions and under that section the language used was that any respondent may upon the hearing of the appeal not only support the decree on any of the grounds decided against him in the Court below, but take any cross-objection to the decree which he could have taken by way of appeal. Therefore, the position under the old law was that it was only when an appeal was heard that the cross-objections could be also heard. The Code was amended in 1908 and the amendments made to S. 561 were two-fold. The expression "upon the hearing" was omitted and a new sub-clause was added which was sub-r. (4), which is in the following terms :

"Where, in any case in which any respondent has under this rule filed a memorandum of objection the original appeal is withdrawn or is dismissed for default, the objection so filed may nevertheless be heard and determined after such notice to the other parties as the Court thinks fit."

[3] Therefore, under sub-r. (4) when an appeal is withdrawn or is dismissed, the cross-objections may nevertheless be heard. Therefore, the original rigour of the law has been relaxed but it has been relaxed, only to this extent, viz. in the two cases laid down in sub-r. (4), (1) where the appeal is withdrawn, and (2) where the appeal is dismissed. It is significant to note that sub-r. (4) does not provide for a case of an abatement of an appeal. Therefore, it is clear that the Legislature did not intend that cross-objections should be heard when the appeal had abated. Under the circumstances, as this case is not a case of a withdrawal of an appeal or a dismissal of an appeal, but is a case of an abatement of an appeal, Mr. Shah's clients have no right to have their cross-objections heard.

[4] The result, therefore, will be that on the abatement of the appeal the cross-objections must stand dismissed. As regards the costs of the appeal, Mr. Shah's clients would be entitled to have the costs out of the estate of the appellant. With regard to the costs of the cross-objections, there will be no order as to costs.

R.G.D.

Order accordingly.

* A. I. R. (36) 1949 Bombay 277 [C. N. 77.]

CHAGLA C. J. AND TENDOLKAR J.

P. V. Rao and others — Appellants v. Khushaldas S. Advani — Respondent.

O. C. J. Appeal No. 65 of 1948 (Misc. Appln. No. 59 of 1948), Decided on 4th January 1949, from judgment of Bhagwati J., D/- 27th September 1948.

✱ (a) *Certiorari* — Writ of — Can be issued only against inferior Court or against persons who are required to act judicially or quasi-judicially — It cannot be issued to correct executive or administrative acts, even though illegal or *ultra vires* — Such acts may be challenged in Court of law — Tests to determine whether act is judicial or quasi-judicial laid down—Order of requisition of premises under Bombay Land Requisition Ordinance, 1947, is quasi-judicial act—Corrective writ of *certiorari* can be issued but only against Province of Bombay and not against individual officers—Bombay Land Requisition Ordinance (V [5] of 1947), S. 3.

A writ of *certiorari* can only be issued against an inferior Court or against a person or persons who are required by law to act judicially or quasi-judicially. It is a high prerogative writ and its purpose is to prevent a judicial or quasi-judicial body from acting in excess of the jurisdiction conferred upon it by law or to see that in exercising its jurisdiction the body acts in conformity with principles of natural justice. Such a writ can never lie to correct executive or administrative acts. An executive or an administrative act may be illegal or *ultra vires* and a subject may challenge it in a Court of law, but he cannot challenge it by a writ of *certiorari*. The very basis and foundation of the writ is that the act complained of must be a judicial or a quasi-judicial act. The right to obtain a writ of *certiorari* is a very important and valuable right that the subject enjoys. It is by means of this writ that the subject can compel the judicial or quasi-judicial body to act within the four corners of its jurisdiction, and, the Court should not be chary of exercising its jurisdiction to issue writs of *certiorari* and prohibition and wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament: (1882) 10 Q. B. D. 309, *Rel. on.* [Para 2]

The following are the tests for the determination of the question, whether the order in question is judicial or quasi-judicial. In the first place, a duty must be cast by the Legislature upon the person or persons who is or are empowered to act, to determine or decide some fact or facts. There must also be some *lis* or dispute resulting from there being two sides to the question he has to decide. There must be a proposal and an opposition. It must be necessary that he should have to weigh the pros and cons before he can come to a conclusion. He would also have to consider facts and circumstances bearing upon the subject. In other words, the duty cast must not only be to determine and decide a question, but there must also be a duty to determine or decide that fact judicially. If the determination or decision of the authority results in binding the subject so as to affect his right or impose a liability upon him, and if the exercise of the power by the authority is made dependent by the Legislature upon a contingency or a condition, which condition or contingency is an objective fact to be established and not left to the opinion of the authority, then, the Court would come to the conclusion that there is a duty upon the authority not

only to decide and determine but to decide and determine judicially. [Para 5]

A true judicial decision presupposes an existing dispute between two or more parties and that involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law. A quasi-judicial decision involves requisites (1) and (2), does not necessarily involve (3) and never involves (4): (1937) 2 K. B. 309, *Rel. on.* [Para 6]

(Per *Tendolkar J.*—If the power to do an act imposing liability or affecting a right of any person is subject to a condition precedent which requires determination, as opposed to a condition which is capable of physical demonstration, the power to do that act must be judicially exercised, unless the statute conferring the power indicates a contrary intention. In determining whether there is a contrary intention the provisions of the statute have got to be carefully scrutinised. Where the power to do an act is not subject to a condition precedent, in order to constitute a judicial or quasi-judicial act there must be (1) the authority to impose a liability or affect the right of any person, (2) the existence of a contest or *lis* as exemplified by a proposal and an opposition, and (3) a duty to decide judicially upon consideration of facts and circumstances. The second of these conditions has sometimes been loosely expressed by saying that there must be two parties. The word "parties" is here used as meaning "sides" and not necessarily "juristic persons.") [Para 31]

It is open to the Legislature to have empowered the Government to affect the rights of the subject and to impose a liability upon him by a mere executive act of Government arrived at purely by subjective reasoning on the part of Government. [Para 5]

Where Legislature does not think fit to do so, but limits the power of the Government and makes it exercisable only upon the happening of a particular contingency, as in S. 3, Bombay Land Requisition Ordinance, V [5] of 1947, and that contingency is the existence of a public purpose (see point (b)), it clearly indicates an intention on the part of the Legislature not to subject the rights of citizens to executive orders to be issued by Government. In such a case the Legislature intends the Government to act within its limited jurisdiction, that jurisdiction being conditioned by land being required for a public purpose, and the Legislature equally intends that if the Government acts in excess of its jurisdiction, its action can be controlled and corrected by a writ of *certiorari*. There can be no doubt that there is a *lis* or dispute which the Provincial Government has to decide, the dispute being whether the subject should be deprived of his property or not. There are also two sides to the dispute. There is a proposal and opposition and there are pros and cons to be considered. The two sides are: The interest of the State which requires the property for a public purpose, and the rights of subject who is being deprived of his property. Requisites (1) and (2) noted above would be present in the decision to be arrived at by Government before they requisition any land under S. 3. There would be the case of the State and the case of the subject to be presented and heard by Government, and as the question to be determined would

be both a question of fact and a question of law, the Government would have to consider both evidence and the legal aspect of the matter, because public purpose is a mixed question of law and fact. [Paras 5 & 6]

The Government can be constituted a Judge in its own cause. The role that the Government or the executive officer has got to play under these circumstances is a judicial role and as such the Government or the executive officer is different from the State whose rights it has to consider as against the rights of the subject : A. I. R. (34) 1947 Bom. 153, *Explained*. [Paras 5 and 34]

Besides the fact that a condition precedent is laid down in S. 3 which has to be satisfied before the authority can exercise its power and the existence of that condition precedent is left not to the opinion of Government but has to be established as a fact, there is a further clear indication by the Legislature that there is a duty cast upon the Provincial Government to act judicially or *quasi* judicially by the power conferred by it under S. 10 to obtain information from the person whose land is to be requisitioned. This section must be read as having a compelling force and also as being a power coupled with a duty. Section 10 must be read along with S. 3 and when under S. 3 "public purpose" is to be determined by Government and when under S. 10 that information may be obtained for the purposes of the Ordinance, it is open to the Court to come to the conclusion that there is a duty upon the Government to decide and a right given to the subject to have a decision and a decision which is a judicial decision arrived at after considering proper materials and evidence as provided by S. 10. [Para 5]

[Per Chagla C. J.—If there was any doubt as to whether an act to be done by a competent authority was a ministerial act or a judicial or *quasi*-judicial act, Court would always give the benefit of the doubt to the subject because it would assume that if the Legislature confers power upon an authority to affect rights or impose liability upon subjects, the Legislature would not ordinarily confer such power without making the power exercisable judicially or *quasi*-judicially. It would not assume that the Legislature would permit the rights of subjects to be affected and liability being imposed upon them without giving an opportunity to the subject to be heard in support of his own rights. It would therefore require a clear indication on the part of the Legislature that it not only conferred a power upon a competent authority to affect the rights of others and impose liability upon them, but also that the power it gave was so wide that it could be exercised without the duty of any judicial or *quasi*-judicial determination : *English and Indian Case law relied*.] [Para 5]

A writ of *certiorari* can only be directed against the authority which has to perform judicial functions and upon which is cast a duty to act judicially and not to act in excess of its jurisdiction. Now, under S. 3 of the Ordinance, it is the Provincial Government which is empowered by order in writing to requisition any land. Where the requisition order makes it clear that it is issued by the order of the Governor of Bombay as every act of the Provincial Government has to be under S. 59, Government of India Act, if the writ of *certiorari* can lie at all, it can only be against the Province of Bombay. The position with regard to writ of prohibition stands on the same footing as the writ of *certiorari*. [Paras 8, 9 and 45]

Thus, an order of requisition issued by the Province of Bombay under Bombay Land Requisition Ordinance is a *quasi*-judicial act which can be subjected to the corrective writ of *certiorari*. But the writ can be issued only against the Province of Bombay.

[Paras 7, 8, 36 and 45]

(b) Bombay Land Requisition Ordinance (V [5] of 1947), S. 3—It is for Provincial Government to decide necessity or expediency of requisition — But requisition must be for public purpose— Government must decide objectively that land is required for public purpose.

By S. 3 the Legislature has left it to the Provincial Government to decide whether it is necessary or expedient to requisition any land. The opinion of the Government on this question is conclusive. But it is not enough that the Government should be of the opinion that it is necessary or expedient to requisition any land. It can only exercise its powers to requisition provided the land is being requisitioned for any public purpose. What is a public purpose is not left to the opinion of the Government. It is an objective fact which has to be determined by Government before it can exercise its power. The very exercise of the power is made conditional upon the land being acquired for a public purpose. The Legislature has thus provided an important safeguard in favour of the subject and a powerful check on the power of Government. [Para 4]

The expression "to do so" following upon "in the opinion of the Provincial Government it is necessary or expedient" means to act in the manner following, and the act which is referred to is the act of requisitioning. "For any public purpose" does not describe the nature or character of the act, but describes the purposes for which the act is to be performed, and therefore "to do so" only refers to the act of requisitioning and not the purpose for which the land is to be requisitioned. Therefore an order of requisition cannot be passed by Government by merely going through a mental process as to whether it is necessary or expedient to requisition any particular land. Nor is it left to Government merely to form an opinion in such a manner and on such materials as they think proper. It is incumbent upon Government to decide objectively that the land is required for a public purpose. The element of determination and decision indisputably enters in the order of requisition to be made under S. 3. Section 3 also circumscribes the jurisdiction of Government to make an order under that section. The limits of Government's jurisdiction are that it is only when land is required for a public purpose that Government is entitled to exercise its power to requisition land. [See observations of Chagla C. J. in pt. (i).] [Para 4]

(c) Specific Relief Act (1877), S. 45 — Applicability—Doing or forbearing of any specific Act must be incumbent on person in his public character — There is no indication in Bombay Land Requisition Ordinance, 1947 of any such provision compelling officer to do or forbear from doing any specific act — Order under S. 45 cannot therefore be issued against public officer issuing requisition order by order of Governor — Bombay Land Requisition Ordinance (V [5] of 1947), S. 3.

An order under S. 45 can only be made provided the doing or forbearing of any specific act is clearly incumbent on the person in his public character to do or to forbear. There is no indication whatever in the Bombay Land Requisition Ordinance of any provision which compels a public officer to do or forbear from doing any specific act. An order under S. 45 against the public officer (Secretary to the Government) issuing a requisition order, by order of the Governor of the Province is therefore unsustainable. [Para 9]

(d) Act of State — Distinction between act of State and act of sovereign authority pointed out— Requisition order under Bombay Land Requisition Ordinance, 1947, is not act of State—Bombay Land Requisition Ordinance (V [5] of 1947), S. 3.

An act of State is different fundamentally from an act of a Sovereign authority. An act of State operates extra-territorially. Its legal title is not any municipal law but the overriding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an act of State as between a sovereign and his subjects. If Government justifies its act under colour of title and that title arises from a municipal law, that act can never be an act of State. Its legality and validity must be tested by the municipal law and in municipal Courts. [Para 11]

Where the Province of Bombay justifies its requisition order under the Bombay Requisition Ordinance, which is a municipal law, it cannot claim as a sovereign authority to be exempt from a municipal Court and cannot claim immunity from having to justify its acts in a municipal Court : 1931 A. C. 662; 7 M. I. A. 476 (P.C.); 12 Beng. L. R. 120 (P.C.); 6 Bom. L. R. 131 and 5 Mad. 273, *Rel. on.* [Para 11]

*(e) Government of India Act (1935), S. 306 — Scope—It gives immunity to Governor from being sued, and not to Provincial Government — Immunity of Governor continues, even after he relinquishes office.

Under S. 306, no proceedings whatever shall lie and no process whatsoever be issued from any Court in India against the Governor of a Province, whether in a personal capacity or otherwise. The same immunity is not given to the Provincial Government. After the Independence Act, the Provincial Governor means under the constitution the Governor and his Ministers. Under the Independence Act the Governor has become a constitutional Governor and all his acts must now be taken with the aid and advice of his Ministers. It is a mistake to read S. 306 as giving an immunity not only to the Governor but to the Provincial Government also. These are two different concepts, and the immunity to the Governor is not an absolute immunity but it is a personal immunity although it extends both to his private and public acts, and is continued even after he ceases to hold the position as the Governor. This itself clearly shows the distinction between the Governor as such and the Provincial Government. [Para 12]

The proviso to S. 306 is not a proviso in the ordinary sense of the term. It is enacted only for greater caution and it is a warning given to Courts not to restrict the right of the subject to sue the Provincial Government by reason of any immunity given to the Governor by S. 306, sub-s. (1) : A. I. R. (17) 1930 Mad. 896; A. I. R. (26) 1939 Mad. 940; A. I. R. (34) 1947 Mad. 443 and A. I. R. (32) 1945 Bom. 419, *Dissent.* [Paras 16 and 48]

Per *Tendolkar J.* — "Personal capacity" means private capacity as an individual, and "otherwise" means public capacity but again as an individual. [Para 46]

(f) Government of India Act (1935), S. 176 — Scope — Writ of certiorari can be issued against Provincial Government.

Section 176 does not speak of suits at all. It merely speaks of the Provincial Government suing or being sued, and it would be wholly wrong to construe the expression "sue or be sued" in a narrow technical sense as referring only to those proceedings in a Court of law which can be initiated by the filing of a plaint. "To sue" in this context can only mean to claim a civil right in a Court of law by any legal procedure by which that civil right can be established. A writ of certiorari can only be obtained by means of petition and not by means of filing a plaint. But what the petitioner does is to claim his civil right by means of this particular procedure which is the only procedure open to him in order to obtain the writ of certiorari. Such a

writ can be issued against the Provincial Government : 7 Bom. L. R. 138 and (1862) 31 Beav. 586, *Rel. on.*

[Para 12]

(g) Government of India Act (1935), S. 223— Apart from S. 306, High Court has under S. 223 jurisdiction to issue writ of certiorari against Province—Certiorari.

[Para 14]

Annotation : ('46-Man.) Government of India Act, S. 223, N. 1.

(h) General Clauses Act (1897, as amended by India Adaptation of Existing Indian Laws Order, 1947), S. 3 (43a)—Expression "Governor" used as equivalent to "Provincial Government" does not refer to Governor in his personal or individual capacity but to the Constitutional Governor who is the head of the Provincial executive and in whose name all the executive authority of the Province is exercised—Exemption under S. 306, Government of India Act, does not apply to Governor in the sense in which this expression is used in General Clauses Act—Government of India Act (1935), S. 306.

[Paras 15 and 49]

Annotation : ('46-Man.) General Clauses Act, S. 3, N. 22.

(i) Bombay Land Requisition Ordinance (V [5] of 1947), S. 3—Requisition must be for public purpose — Requisition for housing refugees is public purpose — But depriving one refugee to house another is not public purpose — Requisition would be without jurisdiction.

If Government requisitions land for a purpose which is not a public purpose it would be acting in excess of its jurisdiction. [Para 17]

The purpose for which land has to be requisitioned must involve some benefit to the community as a whole. But there may be cases where securing a house for an individual may itself confer a benefit upon the community. Each case, therefore, must be determined upon its own facts and circumstances. [Para 17]

Housing of refugees may certainly be a public purpose. But where the Government chooses one refugee and deprives another refugee of the premises, without any ostensible cause, it would not by itself constitute public purpose for which land can be requisitioned. [Para 17]

(*Chagla C. J.*—It should be noted that the Government have subsequently taken to themselves wider powers under a subsequent legislation that has been passed with regard to requisition of land. Now, it is no longer necessary that the land should be requisitioned for a public purpose. It can be requisitioned for any purpose. This means that before Government can requisition land they have no longer to determine as an objective fact the purpose for which land has got to be requisitioned. Not only the necessity and expediency is left to their discretion, but it seems even the purpose for which land is to be requisitioned.) [Para 7]

(j) Bombay Land Requisition Ordinance (V [5] of 1947), S. 11 (2)—Validity of order under S. 3 does not depend upon service of order upon all persons affected by that order—Utmost that can be said is that order is not effective against person unless it is served upon him — But person served cannot say that it is not valid and not enforceable against him, because others are not served. [Para 18]

(k) Civil P. C. (1908), S. 35 — Appellate Court rarely interferes with discretion of lower Court in awarding costs. [Para 19]

Annotation : ('44-Com.) Civil P. C., S. 35, N. 29.

M. P. Amin, Acting Advocate-General and G. N. Joshi — for Appellants.

Sir Jamshedji Kanga, R. J. Kohah and N. A. Palkhiwala — for Respondent.

Chagla C. J. — This is an appeal from a judgment of Bhagwati J. by which he ordered a writ of *certiorari* to issue against respondent 1, who is the Assistant Secretary to the Government of Bombay, Health and Local Government Department, the Province of Bombay, respondent 2, and Mr. Vartak, a Minister of the Government of Bombay, formerly in charge of the Health and Local Government Department, respondent 3. The material facts which led up to the order made by Bhagwati J. may be briefly stated. One Abdul Hamid Ismail was, prior to 29th January 1948, the tenant of the first floor of a building known as "Paradise" at Warden Road, Bombay, the landlord of which was one Dr. M. V. Vakil. On 29th January 1948, Ismail assigned his tenancy to the petitioner and two others, the son and brother's daughter's son of the petitioner. All the three assignees were refugees from Sind. On 4th February 1948, the petitioner went into possession of the flat. On 26th February 1948, the Government of Bombay issued an order requisitioning the flat. The order was issued under S. 3 of the Bombay Land Requisitioning Ordinance, V [5] of 1947, which had come into force on 4th December 1947. The order purported to be issued by order of the Governor of Bombay and was signed by P. V. Rao as Secretary to the Government of Bombay, Health and Local Government Department. On the same day Mr. Rao, wrote to Dr. Vakil informing him that Government had allotted the premises to Mrs. C. Dayaram. Mrs. C. Dayaram is also a refugee from Sind. On 27th February 1948, the Government of Bombay, in exercise of the powers conferred upon them by S. 9 of the Ordinance, authorised Mr. A. J. Lalvani, an Inspector of the Health and Local Government Department, to take possession of the premises. On 4th March 1948, the petitioner filed a petition for a writ of *certiorari* and an order under S. 45, Specific Relief Act, 1877. On that petition an interim injunction was granted restraining the Government from obtaining possession of the flat. Originally the petition was directed only against respondent 1, but by a subsequent amendment the Province of Bombay and Mr. Vartak were brought on the record of the petition and an order was sought against them also. It is on this petition that Bhagwati J. made the order from which this appeal is preferred.

[2] A writ of *certiorari* can only be issued against an inferior Court or against a person or persons who are required by law to act judicially or *quasi-judicially*. It is a high prerogative writ and its purpose is to prevent a judicial or *quasi-judicial* body from acting in excess of the jurisdiction conferred upon it by law or to see that in exercising its jurisdiction the body acts in

conformity with principles of natural justice. Such a writ can never lie to correct executive or administrative acts. An executive or an administrative act may be illegal or *ultra vires* and a subject may challenge it in a Court of law, but he cannot challenge it by a writ of *certiorari*. The very basis and foundation of the writ is that the act complained of must be a judicial or a *quasi-judicial* act. The right to obtain a writ of *certiorari* is a very important and valuable right that the subject enjoys. It is by means of this writ that the subject can compel the judicial or *quasi-judicial* body to act within the four corners of its jurisdiction, and, as has been said by Lord Justice Brett in *The Queen v. Local Government Board*, (1882) 10 Q. B. D. 309; (52 L. J. M. C. 4), the Court should not be chary of exercising its jurisdiction to issue writs of *certiorari* and prohibition and that

"wherever the legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

[3] Therefore, what we have to consider is whether the order passed by Government on 26th February 1948, requisitioning the premises which were in possession of the petitioner was a judicial or *quasi-judicial* order. In order to determine the nature of the power conferred upon Government by the Ordinance, it is necessary to consider its nature, scope and effect, and in order to do so we must consider the scheme of the Ordinance which confers those powers. The Ordinance is entitled "An Ordinance provided for the requisition of land, for the continuance of requisition of land", and for certain other purposes. Section 3 empowers the Provincial Government to requisition any land for any public purpose if in its opinion it is necessary or expedient to do so. "Land" is defined as including benefits to arise out of land and premises and all things attached to the earth or permanently fastened to the premises or things attached to the earth. It is not disputed that under this section the Government would have the power to requisition the premises in question. Section 4 deals with vacant premises. What are vacant premises is defined and an obligation is cast upon the landlord to give intimation if any premises become vacant, and a landlord is precluded from letting vacant premises without the permission of Government before giving such intimation and for a period of one month from the date on which such intimation is given. Subsection (4) empowers the Government to requisition vacant premises. Section 6 provides for the payment of compensation in respect of premises

requisitioned after an inquiry has been held. Section 9 confers power upon Government to take possession of requisitioned premises. Section 10 empowers the Government, with a view to carry out the purposes of the Ordinance, to require by order any person to furnish to such authority as may be specified in that order such information in his possession as may be relevant or material. Section 11 deals with publication and service of orders.

[4] Going back to S. 3, with which we are concerned, the Legislature has left it to the Provincial Government to decide whether it is necessary or expedient to requisition any land. The opinion of the Government on this question is conclusive. But it is not enough that the Government should be of the opinion that it is necessary or expedient to requisition any land. It can only exercise its power to requisition provided the land is being requisitioned for any public purpose. What is a public purpose is not left to the opinion of the Government. It is an objective fact which has to be determined by Government before it can exercise its power. The very exercise of the power is made conditional upon the land being acquired for a public purpose. It was attempted to be argued that whether the purpose for which the Government wants to requisition land is a public purpose or not was also left to the opinion of the Government and it was suggested that the expression "to do so" following upon "in the opinion of the Provincial Government it is necessary or expedient" covered not only the requisitioning of land, but also for any public purpose. In my opinion, that is not a proper construction of the expression "to do so." "To do so" means to act in the manner following, and the act which is referred to is the act of requisitioning. "For any public purpose" does not describe the nature or character of the act, but describes the purposes for which the act is to be performed, and therefore "to do so" only refers to the act of requisitioning and not the purpose for which the land is to be requisitioned. It will, therefore, be seen that the Legislature has provided an important safeguard in favour of the subject and a powerful check on the power of Government by providing that Government can only exercise its discretion to requisition land provided in the first instance it comes to a decision that the land to be requisitioned is required for a public purpose. Therefore an order of requisition cannot be passed by Government merely going through a mental process as to whether it is necessary or expedient to requisition any particular land. Nor is it left to Government merely to form an opinion in such a manner and on such materials as they think proper. It is incumbent upon

Government to decide objectively that the land is required for a public purpose. The element of determination and decision indisputably enters in the order of requisition to be made under S. 3. Section 3 also circumscribes the jurisdiction of Government to make an order under that section, and the limits of Government's jurisdiction are that it is only when land is required for a public purpose that Government is entitled to exercise its power to requisition land.

[5] Various authorities and many learned Judges have attempted to draw the line which demarcates an executive order from a judicial or *quasi-judicial* order. I shall presently deal with some of the authorities, but before I do so I would like to state what in my opinion is the true definition of a judicial or *quasi-judicial* act as a result of a review of the authorities that were cited at the Bar. In the first place, a duty must be cast by the Legislature upon the person or persons who is empowered to act to determine or decide some fact or facts. There must also be some *lis* or dispute resulting from there being two sides to the question he has to decide. There must be a proposal and an opposition. It must be necessary that he should have to weigh the pros and cons before he can come to a conclusion. He would also have to consider facts and circumstances bearing upon the subject. In other words, the duty cast must not only be to determine and decide a question, but there must also be a duty to determine or decide that fact judicially. If the determination or decision of the authority results in binding the subject so as to affect his right or impose a liability upon him, and if the exercise of the power by the authority is made dependent by the Legislature upon a contingency or a condition, which condition or contingency is an objective fact to be established and not left to the opinion of the authority, then, in my opinion, the Court would come to the conclusion that there is a duty upon the authority not only to decide and determine but to decide and determine judicially. In the case before us it was open to the Legislature to have empowered the Government to affect the rights of the subject and to impose a liability upon him by a mere executive act of Government arrived at purely by subjective reasoning on the part of Government. The Legislature did not think fit to do so. It limited the power of Government and made it exercisable only upon the happening of a particular contingency, and that contingency was the existence of a public purpose. This, to my mind, clearly indicates an intention on the part of the Legislature not to subject the rights of citizens to executive orders to be issued by Government. The Legislature intended that Government could only act within its limited

jurisdiction, that jurisdiction being conditioned by land being required for a public purpose, and the Legislature equally intended that if the Government acted in excess of its jurisdiction, its action could be controlled and corrected by a writ of *certiorari*. There can be no doubt that there is a *lis* or dispute which the Provincial Government has to decide, the dispute being whether the subject should be deprived of his property or not. There are also two sides to the dispute. There is a proposal and opposition and there are pros and cons to be considered. The two sides are: The interest of the State which requires the property for a public purpose, and the rights of the subject who is being deprived of his property. It may be said that the Government cannot be constituted a Judge in its own cause because Government would be asked to adjudicate between itself and the subject, and what a dispute and an adjudication requires is two parties and an adjudicator different from and independent of the two parties. In my opinion, there is no reason why the Provincial Government or an executive officer cannot be constituted a Judge to decide questions arising between the State and the subject. The role that the Government or the executive officer has got to play under these circumstances is a judicial role and as such the Government or the executive officer is different from the State whose rights it has to consider as against the rights of the subject. I should further add that if there was any doubt as to whether an act to be done by a competent authority was a ministerial act or a judicial or *quasi-judicial* act, I would always give the benefit of the doubt to the subject because I would assume that if the Legislature confers power upon an authority to affect rights or impose liability upon subjects, the Legislature would not ordinarily confer such power without making the power exercisable judicially or *quasi-judicially*. I would not assume that the Legislature would permit the rights of subjects to be affected and liability being imposed upon them without giving an opportunity to the subject to be heard in support of his own rights. I would therefore require a clear indication on the part of the Legislature that it not only conferred a power upon a competent authority to affect the rights of others and impose liability upon them, but also that the power it gave was so wide that it could be exercised without the duty of any judicial or *quasi-judicial* determination. In the case before us, far from there being any such indication on the part of the Legislature, I find that the intention of the Legislature is clear from the fact to which I have already referred, viz., that a condition precedent is laid down which has to be satisfied before the authority can

exercise its power, and the existence of that condition precedent is left not to the opinion of Government but has to be established as a fact. It is also significant to note that there is a further clear indication by the Legislature that there is a duty cast upon the Provincial Government to act judicially or *quasi-judicially* by the power conferred by it under S. 10 to obtain information from the person whose land is to be requisitioned. It may be suggested that this is merely an enabling section and casts no duty upon the Government or confers no right upon the subject. But in my opinion, this section must be read as having a compelling force and also as being a power coupled with the duty. We must read S. 10 along with S. 3, and when we find that in S. 3 public purpose is to be determined by Government and when we find in S. 10 that information may be obtained for the purposes of the Ordinance, I think it is open to the Court to come to the conclusion that there is a duty upon the Government to decide and a right given to the subject to have a decision and a decision which is a judicial decision arrived at after considering proper materials and evidence as provided by S. 10.

[6] Turning to the authorities, we have the classical definition of Atkin L. J. in *Rex v. Electricity Commissioners: London Electricity Joint Committee Co. (1920), Ex parte*, (1924) 1 K. B. 171 at p. (205) : (93 L. J. K. B. 390) :

Wherever any body of persons have any legal authority to determine questions affecting the rights of others and have the duty to act judicially, and act in excess of the legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

The difficulty of course that always arises is to decide in which cases there is a duty cast upon a body of persons to act judicially. That duty exists when the determination to be arrived at by the body is a judicial or *quasi-judicial* determination, and May C. J. in *The Queen v. Corporation of Dublin*, (1878) L. R. 2 Ir. 371 at p. 376, defines a judicial act as an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights of others. This definition was described as one of the best definitions by Lord Atkinson in *Frome United Breweries Co. v. Bath Justices*, (1926) A. C. 586 at p. 602 : (95 L. J. K. B. 730). There is another Irish Judge whose dictum is also both weighty and appropriate, and that is Pales C. B., and the dictum appears in *Reg. (Wexford County Council) v. Local Government Board*, (1902) 2 Ir. 349 (p. 373):

"I have always thought that to erect a tribunal into a 'Court' or 'jurisdiction,' so as to make its determinations judicial, the essential element is that it should

have power, by its *determination* within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the rights affected by the determination only and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of facts or law, then the power authorising it is judicial."

In this case the determination of the Provincial Government binds the subject because it is left to the opinion of the Government whether it is expedient or necessary to requisition any land and that determination is made dependent upon the happening of a contingency, viz., the existence of a public purpose. Moulton L. J. in *Rex v. Wood-house*, (1906) 2 K. B. 501 at p. 535: (75 L. J. K. B. 745), expresses the opinion that there must be the exercise of some right or duty to decide in order to provide scope for the writ of *certiorari* at Common law. Scrutton L. J. in *Rex v. London County Council: Entertainments Protection Association, Ex parte*, (1931) 2 K. B. 215: (100 L. J. K. B. 760), considers the meaning of the Court to which a writ of *certiorari* can be issued (p. 233):

"It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of *certiorari*."

The Advocate General has relied on a decision reported in *Cooper v. Wilson*, (1937) 2 K. B. 309: (1937-2 ALL E. R. 726). The question that the Court was considering was whether the Watch Committee had acted properly in dismissing a sergeant in the Liverpool Police Force. He was dismissed by the Chief Constable. He appealed from the decision of the Chief Constable to the Watch Committee and the Watch Committee dismissed the appeal. Now in his judgment Scott L. J. was not considering the distinction between a judicial or *quasi-judicial* act and a ministerial act, but what he was considering was the distinction between a judicial act and a *quasi-judicial* act, and this distinction was necessary to consider because what the learned Lord Justice had to decide was whether the procedure followed by the Watch Committee was a proper procedure, or not, and Scott L. J. at p. 340 accepts the Report of the Ministers' Powers Committee as definition of the words "judicial" and "*quasi-judicial*." According to this report a true judicial decision

presupposes an existing dispute between two or more parties, and that involves four requisites: (1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including, where required, a ruling upon any disputed question of law. A *quasi-judicial* decision involves requisites (1) and (2), does not necessarily involve (3), and never involves (4). I do not see how requisites (1) and (2) would not be present in the decision to be arrived at by Government before they requisition any land under S. 3. There would be the case of the State and the case of the subject to be presented and heard by Government, and as the question to be determined would be both a question of fact and a question of law, the Government would have to consider both evidence and the legal aspect of the matter, because public purpose is a mixed question of law and fact. (See the decision of the Privy Council in *Hamabai Framji Petit v. Secretary of State for India, and Moosa Hajee Hassan v. Secretary of State for India*, 39 Bom. 279: (A.I.R. (1) 1914 P. C. 20), where they adopted the definition of Batchelor J., viz., an object or aim, in which the general interest of the community, as opposed to the particular interest of individuals, is directly and vitally concerned.)

[7] The Advocate General has relied on a decision of Kania J., as he then was, reported in *Karkhushru Sorabji v. Commissioner of Police, Bombay*, 48 Bom. L. R. 717: (A. I. R. (34) 1947 Bom. 153). The order that the learned Judge was considering was an order made under R. 17 (i) (a), (ii) (a), Defence of India Rules. That rule provided that the Director-General of Posts and Telegraph, or any person authorised by him, may by an order direct that any subscriber's telephone connection to any exchange shall be cut off for such period as may be specified. With respect to the learned Judge, it is clear that this rule did not require any authority to determine any fact before the order could be made, and therefore clearly, as the learned Judge held, the order was not a *quasi-judicial* order. But reliance is placed on the following observations in the judgment of Kania J. (p. 720):

"It appears to me that unless the authority invested with the power to pass an order had to act judicially,

i. e., to weigh a question from two sides and decide on the matter, no question of *quasi-judicial* act can arise. The two sides cannot include himself as he is the deciding authority."

It is urged that in this case also the Province of Bombay is the deciding authority and therefore it cannot be considered as the side in opposition to the subject. But, as I have already pointed out, the conflict is between the subject and the State and there is no reason why Government or a Government official cannot be constituted a *quasi-judicial* tribunal to determine that conflict. The learned Judge makes the position more clear in the subsequent part of his judgment. This is what he says (p. 720):

"In the present case, in my opinion, the act of the respondent in making the order is not *quasi-judicial*. He has not to consider a proposition and opposition. He has not to weigh different facts and/or law and decide whether the order should be made or not."

Therefore, what is really required is that there should be a proposition and opposition and also that the deciding authority should have to weigh facts and law. In the case before us, there is definitely a proposition and an opposition and the Government has to weigh facts and law before coming to the conclusion that the land should be requisitioned. Reliance is also placed on the case of *Franklin v. Minister of Town and Country Planning*, (1947) 176 L. T. 312. By S. 1, New Towns Act, 1946, the Minister of Town and Country Planning was empowered to make an order designating an area as the site of a proposed new town, if he was satisfied that it was expedient to do so. By para. 3 of Sch. 1 of the Act, if any objection was duly made to the proposed order, the Minister before making the order had to cause a public local inquiry to be held with respect thereto. The question arose whether the order to be made by the Minister was a *quasi-judicial* order and whether the Minister was bound to hear both sides and to establish that he had no bias in favour of a particular scheme. The Court held that there was no *lis* and that the Minister was a Judge in the matter in which he was himself interested from the public point of view. It seems to me that obviously the order to be made by the Minister was not a *quasi-judicial* order, because the only condition which had to be satisfied before the order could be made was that the Minister had to be satisfied that it was expedient. No objective fact had to be determined. This case went to the House of Lords and in their judgment reported in (1948) A. C. 87, the House of Lords affirmed the decision of the Court of Appeal. Reference was also made by the Advocate-General to *Rex v. Archbishop of Canterbury*, (1944) 2 K. B. 282 : (113 L. J. K. B. 179). There was a vacancy in a Benefice and the

patron made a presentation, and under the law the Bishop's approval had to be obtained. The Bishop refused to give his approval and the patron appealed to the Archbishop for the review of the Bishop's decision. The Archbishop without hearing the patron upheld the decision of the Bishop. The patron applied for a writ of *certiorari*. The writ was refused on the ground that the Archbishop like the Bishop before him was not exercising a function analogous to that of a person hearing a *lis inter partes* and that he was not under an obligation to act in a *quasi-judicial* manner. Now, the decision of this case really turned on the special provisions of the Benefices Measure of 1931. The Court of Appeal pointed out that the function that the Bishop had to discharge in approving a clerk was a personal, intimate and delicate one, and the task of the Archbishop was equally so. The Court of Appeal was at pains to point out that all that had to be considered was whether the clerk presented was suitable to discharge his duties and that no question arose of depriving a person of his right of property or limiting his right to exercise it. Reference was also made to the case of *Hutton v. Attorney General*, (1927) 1 Ch. 427 : (96 L. J. Ch. 285). In that case the question arose with regard to the compulsory acquisition of land for military purposes under the Defence Act of 1842. Two requisites had to be satisfied. One was a certificate to be issued by the Lord Lieutenants or two Deputy Lieutenants of the County or riding in which the land was situated that the taking of the land was necessary or expedient, and a warrant to be issued by the treasury. The Court held that the granting of a certificate by the Lord Lieutenants or the Deputy Lieutenants was not a judicial but merely an administrative act. In the first place, it must be borne in mind that whether the taking of the land is necessary or expedient is purely a subjective fact. In the second place, as Tomlin J. pointed out in his judgment at p. 438, the Defence Act of 1842 provides for judicial officers wherever judicial functions had to be performed, and finally the issuing of a warrant authorising the taking of the land and the certificate deciding that it was necessary or expedient to do so were two separate acts to be performed by two separate authorities. In this connection the case of *R. v. Boycott*, (1939) 2 ALL E. R. 626 : (1939-2 K. B. 651) might be considered. In that case the question arose whether a boy aged 11, attending a County Council school, was mentally defective. A certificate was issued by the Local Education Authority certifying the boy as an imbecile. The certificate was signed by two doctors, one of whom had never examined the boy. Hewart L. C. J. and Humphreys and Singleton JJ. issued

a writ of *certiorari* holding that in issuing a certificate the Local Authority was doing a *quasi-judicial* act. Section 31, Mental Deficiency Act imposed a duty upon the Local Education Authority to ascertain that children were incapable by reason of mental defect of receiving benefit or further benefit from instruction in special schools or classes, and the Court held that the act of ascertaining was a *quasi-judicial* act and in doing so the authority had to perform judicial functions. These authorities, in my opinion, clearly bear out and in no way go counter to the proposition I have set out earlier in my judgment. Therefore I come to the conclusion that the order of requisition issued by the Province of Bombay was a *quasi-judicial* act which can be subjected to the corrective writ of *certiorari*. It would be perhaps interesting to note that Government have subsequently taken to themselves wider powers under a subsequent legislation that has been passed with regard to requisition of land. Now, it is no longer necessary that the land should be requisitioned for a public purpose. It can be requisitioned for any purpose. This means that before Government can requisition land they have no longer to determine as an objective fact the purpose for which land has got to be requisitioned. Not only the necessity and expediency is left to their discretion, but it seems even the purpose for which land is to be requisitioned.

[8] The next question that arises is whether, if the act complained of is a *quasi-judicial* act, the High Court has jurisdiction to issue a writ of *certiorari* against the respondents or any of them. We might briefly deal with the case of respondents 1 and 3. A writ of *certiorari* can only be directed against the authority which has to perform judicial functions and upon which is cast a duty to act judicially and not to act in excess of its jurisdiction. Now, under S. 3 of the Ordinance, it is the Provincial Government which is empowered by order in writing to requisition any land. It is neither Mr. P. V. Rao nor Mr. Vartak, the Minister, who is so empowered, and the impugned order itself makes it clear that it is issued by the order of the Governor of Bombay as every act of the Provincial Government has to be under S. 59, Government of India Act. Therefore, if the writ of *certiorari* can lie at all, it can only be against the Province of Bombay, which is respondent 2. The learned Judge, with respect, was therefore clearly in error in issuing a writ against respondents 1 and 3. The petition of the petitioner is misconceived against those two respondents and must fail.

[9] Although in the order as drawn up, only the writ of *certiorari* has been ordered to be issued against the three respondents, in his judg-

ment the learned Judge has come to the conclusion that the writ of prohibition should also be issued against all the three respondents and also an order should be made under S. 45, Specific Relief Act against respondents 1 and 3. The position with regard to the writ of prohibition stands on the same footing as the writ of *certiorari* and need not be discussed further. With regard to the order under S. 45, an order under S. 45 can only be made provided the doing or forbearing of any specific act is clearly incumbent on the person in his public character to do or to forbear. With respect to the learned Judge, it is difficult to understand how it is incumbent upon Mr. P. V. Rao or upon Mr. Vartak from forbearing from enforcing or taking or continuing to take any proceedings for enforcing the requisition order passed by the Province of Bombay. The Court must find within the terms of the Ordinance itself that some specific act has to be done or forborne by a public officer. I find no indication whatever in the Ordinance of any such provision which compels Mr. Rao or Mr. Vartak to do or forbear from doing any specific act. Therefore the order under S. 45 against respondents 1 and 3 is clearly unsustainable.

[10] With regard to the Province of Bombay, it has been argued by the Advocate-General that the Provincial Government cannot be brought before the Court and cannot be sued in respect of any governmental or executive act. It is contended that Government can only be sued in respect of such acts as can be performed by an individual or by a trading corporation. But when Government acts as a sovereign authority, its acts are outside the purview of municipal Courts and cannot be questioned in those Courts. This is rather a startling proposition. According to the Advocate-General, the Courts of law in India cannot compel Government to justify its acts as being within the law and cannot give any protection to the subject if Government affects his rights or imposes a liability upon him contrary to the provisions of the law. If such a proposition were sound, it would completely undermine the position of the judiciary and deprive the subject of the one sure and certain protection he has in an independent judiciary against the illegal and unjustifiable encroachments of the executive. Fortunately, as I shall point out, the proposition put forward by the Advocate-General is wholly untenable and entirely contrary to the basic principles of British jurisprudence. The Privy Council in *Eshugbayi Eleko v. Government of Nigeria* (*Officer Administering*), 1931 A. C. 662 : (A. I. R. (18) 1931 P. C. 248), were considering the executive acts of the Governor of Nigeria who issued an order against an appellant to leave a specified area, and upon his failing to

comply, ordered his deportation to another place in the Colony, and Lord Atkin at p. 670 used words which are in keeping with the highest traditions of British Judges and British justice :

"In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a Court of justice. And it is the tradition of British justice that Judges should not shrink from deciding such issues in the face of the executive."

[11] The submission of the Advocate-General is based on s. 176, Government of India Act. That section is procedural and provides how the Dominion of India and the Provincial Government may sue or be sued. The Provincial Government has to be sued in the name of the Province, and the Dominion of India and the Provincial Government may sue or be sued in relation to their respective affairs in the like cases as the Secretary of State for India in Council might have sued or been sued if the Government of India Act of 1935 had not been passed. It is necessary to trace the history of this section. By 3 & 4 Will. IV, c. 85, the East India Co. was made a trustee for the Crown in respect of all the property which it possessed in India, and with regard to all the debts and liabilities of the Company they were charged upon the revenues of India. When the Indian territories were transferred to the Crown, the Act of 1858, 21 & 22 Vic., c. 106, was passed, and s. 65 of that Act provided that the Secretary of State for India in Council should and might sue and be sued as a body corporate and that all persons might have and take the same remedies and proceedings legally and equitably against the Secretary of State for India in Council as they could have done against the East India Co., and that the property and effects thereby vested in Her Majesty for the purposes of the Government of India or acquired for the said purposes should be subject and liable to the same judgments and executions as they would, while vested in the Company, have been liable to in respect of debts and liabilities lawfully contracted and incurred by the said Company. Therefore, in all those cases in which the East India Co. could be sued by the subject, the Secretary of State for India in Council was substituted and the action had to be filed not against the Company but against the Secretary of State for India in Council as a body corporate. Section 32, Government of India Act of 1915 continued the same provision. Sub-section (1) provided that the Secretary of State for India in Council may sue and be sued in the name of the Secretary of State for India in Council as a body corporate, and sub-s. (2) provided that every person shall have the same remedies against the Secretary of State for India in

Council as he might have had against the East India Co. if the Government of India Act of 1858 and this Act had not been passed. And when we come to the Act of 1935 we find that the Dominion of India and the different Provinces were constituted juristic persons as it were for the purposes of suing and being sued just as the Secretary of State for India in Council was under the earlier legislation. Therefore, one might say that the Province of Bombay is in direct line of succession to the East India Co. The Advocate General's contention is that the East India Co. performed two separate and different functions : (1) as a trading corporation, and (2) as a governing body exercising sovereign authority; and the Advocate-General's submission is that it is only with regard to the acts that fall in the first category that the East India Co. could be sued. In respect of this proposition reliance is placed on the well-known case of *P. & O. S. N. Co. v. Secretary of State for India*, 5 Bom. H. C. R. (App.) 1. There the Supreme Court of Calcutta, Peacock C. J., Jackson and Wells JJ., held that the Secretary of State in Council of India was liable for damages occasioned by negligence of servants in the service of Government if the negligence is such as would render an ordinary employer liable. Reliance is placed not so much on the decision of the case as on certain observations in the judgment of Peacock C. J. At p. 13 the learned Chief Justice says :

" they were a company to whom sovereign powers were delegated, and who traded on their own account and for their own benefit, and were engaged in transactions partly for the purposes of government, and partly on their own account, which, without any delegation of sovereign rights, might be carried on by private individuals. There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

Again at p. 14 :

"But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."

On the strength of these observations it is urged that no action can lie against the Province of Bombay in respect of an act which is done in the exercise of its sovereign powers. It is said that the act of requisition cannot be done by a private individual but it can only be done by an authority which is exercising a sovereign power. Now, it is to be noted that Peacock C. J. made it clear in his judgment that the East India Co. was not a sovereign body and it did not have any attributes of sovereignty. If the

learned Chief Justice was referring to sovereign acts as acts of State, then with very great respect the observations are correct and must be accepted. An act of State is different fundamentally from an act of a sovereign authority. An act of State operates extra-territorially. Its legal title is not any municipal law but the overriding sovereignty of the State. It does not deal with the subjects of the State but deals with aliens or foreigners who cannot seek the protection of the municipal law. It is difficult to conceive of an act of State as between a sovereign and his subjects. If Government justifies its act under colour of title and that title arises from a municipal law, that act can never be an act of State. Its legality and validity must be tested by the municipal law and in municipal Courts. In this case the Province of Bombay is justifying its requisition order under the Ordinance which is a municipal law, and therefore it cannot claim as a sovereign authority to be exempt from a municipal Court and cannot claim immunity from having to justify its act in a municipal Court. As I shall presently point out, the position with regard to the East India Co. was the same. The East India Co. could have been sued in all cases except in respect of those which it did not seek to justify on grounds of municipal law. In the case to which I have already referred, *Eshugbayi Eleko v. Government of Nigeria (Officer Administering)*, 1931 A. C. 662 : (A.I.R. (18) 1931 P. C. 248), Atkin L. J. in the judgment of the Privy Council at p. 671 says :

"A suggestion was made by one of the learned Judges that the order in this case was an act of State. This phrase is capable of being misunderstood as applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the Act."

As far back as 1859, in the case of *Secretary of State for India in Council v. Kamachee Boye Sahaba*, 7 M. I. A. 476 : (13 Moo P. C. 22), the Priyy Council held that the municipal Court had no jurisdiction to inquire into the propriety of the act of the East India Co. seizing the State of Tanjore as the delegate of the British Government, and at p. 529 their Lordships observed :

"The transactions of independent States between each other are governed by other laws than those which Municipal Courts administer : such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

At p. 531 their Lordships distinguish between an act of State and one which is not an act of State :

"The next question is, what is the real character of the act done in this case ? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law ? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor ? If it were the latter, the defence set up, of course, has no foundation."

It is therefore only an act not effecting to justify itself on grounds of municipal law which is immune from the scrutiny of a municipal Court. The Privy Council again in *Forester v. Secretary of State*, I. A. Sup. Vol. 10 : (12 Beng. L. R. 120 (P. C.)), distinguished the *Tanjore case*, (7 M. I. A. 476 : 13 Moo. P. C. 22) from the case they had before them where the seizure of lands was under colour of title, and they held that when possession is taken by Government under colour of a legal title, it does not constitute an act of State. The subject claimed a right to be entitled to the lands in derogation of the title of Government, and the Privy Council held that that claim, like any other claim arising between the Government and its subjects, would *prima facie* be cognizable by the Municipal Courts of India. A similar question had to be considered by this High Court in *Jehangir v. Secretary of State for India*, 6 Bom. L. R. 131. The plaintiff had filed this suit claiming damages for defamatory statements contained in a resolution issued by Government. One of the contentions raised was that the power to censure or reprimand a Government servant was an act of State and therefore not cognizable by the Court, and Batty J. at p. 139 says that though the appointment or dismissal of a certain class of officers is among the functions of a Government, and is not exercisable by private individuals as such, it is a power which is exercisable only in pursuance of an authority conferred and regulated by Municipal law and deriving its justification therefrom, and subject to limitations thereby imposed. At p. 140 the learned Judge observes :

"An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferrable by law, but which must rest for its jurisdiction on considerations of external politics and inter-statal duties and rights. . . . In dealing with its own subjects therefore a Government must defend its action as justified by positive law, and cannot rely on a plea of political expediency which would only justify action in relation to foreign matters to which the law of the land does not extend."

And further on the learned Judge quotes with approval the statement in Stephen's Criminal Law that as between the Sovereign and his subjects there can be no such thing as an act of

State. Although Batty and Jacob JJ., differed on the question as to whether the suit was maintainable against the Secretary of State for defamation and the case was referred to Chandavarkar J. as the third Judge, both the other two Judges did not differ from Batty J. with regard to the principles which he enunciated as to the liability of the Secretary of State to be sued in municipal Courts. There is a judgment of the Madras High Court which has enunciated the same principle, in *Secretary of State for India in Council v. Hari Bhanji*, 5 Mad. 273. The headnote correctly sets out in substance what the learned Sir Charles Turner C. J. stated in his judgment :

"The acts of state of which the municipal Courts of British India are debarred from taking cognizance, are acts done in the exercise of sovereign powers which do not profess to be justified by Municipal law.

Where an act complained of is professedly done under the sanction of municipal law, and in the exercise of powers conferred by that law, the fact that it is done by the sovereign power and is not an act which could possibly be done by a private individual, does not oust the jurisdiction of the civil Courts."

At p. 279 the learned Chief Justice says :

"..... the decided cases show that in the class of acts which are competent to the Government and not to any private person, a distinction taken is between those which lie outside the province of municipal law and those which fall within that law, and that it is of the former only that in this country the municipal Courts in British India cannot take cognizance."

Therefore, it is clear that the only slender foundation for the contention of the Advocate-General is the remarks of the learned Chief Justice in the *Peninsular case*, (5 Bom. H. C. App. 1 : Bourke A. O. C. 166). But when that case is clearly understood, it will be seen that although the learned Chief Justice makes a distinction between the class of acts which a private individual or a trading corporation can perform and those which can be performed by a sovereign power, what the case actually decides is that the particular case which was before the Court fell in the former category. The learned Chief Justice, with respect, was not called upon to decide that all acts falling in the latter category were exempt from the scrutiny of the Courts. In any case, the authority of this decision has been considerably shaken by the view expressed by the Privy Council recently in *R. Venkata Rao v. Secretary of State for India*, 64 I. A. 55 : (A. I. R. (24) 1937 P. C. 31). The appellant in that case sued the Secretary of State for India in Council for damages for wrongful dismissal. The Courts in India relied on S. 32, Government of India Act as limiting the right of the appellant to sue the Secretary of State for India in Council in those identical cases where a suit would have lain against the East India Co. Their Lordships of the Privy

Council say that they should not be taken to give their assent to that reason. They further go on to observe that as then advised they look upon that section as merely relating to parties and procedure, and if an action lay against Government that right could not be taken away merely because an identical right of action did not exist against the East India Co.; and in this connection they refer to S. 32, Government of India Act and also to the *Peninsular case*, (5 Bom. H. C. App. 1 : Bourke A. O. C. 166), on which apparently the reasoning accepted by the Courts in India was based. Therefore it would not be too much to assume that if the *Peninsular case*, (5 Bom. H. C. App. 1 : Bourke A. O. C. 166) laid down that the right of the subject to sue Government was limited by any consideration as to whether the East India Co. could or could not have been sued as a trading corporation, that was not the correct statement of the law.

[12] The next contention put forward by the Advocate-General is that there is a complete immunity given to the Governor against being brought before a Court of law, and in asking for a writ against the Provincial Government the petitioner is in effect violating that immunity. It is submitted in the first instance that this Court being the King's Court the Crown cannot be made subject to its writ. This submission is wholly erroneous because the Governor is not the Crown; he is merely the agent of the Crown in the Province of Bombay; and the English Courts have never recognised the principle that a Governor of a Colony or a dependency cannot be sued in English Courts. Numerous cases are to be found in the books where Governors of Colonies have been successfully sued in Courts in England. Therefore, if the Governor has an immunity at all, that immunity must be found expressly in some statute or legislation. For that purpose reliance is placed on S. 306, Government of India Act. Under this section, no proceedings whatever shall lie and no process whatsoever be issued from any Court in India against the Governor of a Province, whether in a personal capacity or otherwise. It is argued that the Provincial Government is really the Governor because under S. 49 the executive authority of a Province is exercised on behalf of His Majesty by the Governor, and according to the Advocate-General the Provincial Government and the Governor are interchangeable terms. Therefore, according to him, if immunity is given to the Governor, the same immunity is given to the Provincial Government. In my opinion, the Provincial Government means, under the constitution, the Governor and his Ministers. Before the Independence Act, the

Governor had his individual judgment and his discretion and in certain matters he was entitled to act contrary to the advice given by the Ministers or even without taking their advice. Under the Independence Act the Governor has become a constitutional Governor and all his acts must now be taken with the aid and advice of his Ministers. But even so, I agree that the Governor does constitute an important part of the machinery which administers the Province and which is described by the expression "Provincial Government". But, in my opinion, it is a mistake to read S. 306 as giving an immunity not only to the Governor but to the Provincial Government also. These are two different concepts, and the immunity to the Governor is not an absolute immunity but it is a personal immunity although it extends both to his private and public acts. The second part of the section extends that immunity to the Governor even after he has relinquished his office, and he cannot be sued in respect of anything done or omitted to be done by him during his term of office in performance or purported performance of the duty thereof except with the sanction of the Governor-General. It cannot be said that after the Governor has left office he continues to be the Provincial Government. But the immunity given to the Governor personally is continued even after he ceases to hold the position as the Governor. This itself clearly shows the distinction between the Governor as such and the Provincial Government. But the proviso to S. 306 makes the position perfectly clear. Strictly it is not a proviso; it is merely a clarification; and what it lays down is that nothing in S. 306 shall be construed as restricting the right of any person to bring against the Dominion or a Province such proceedings as are mentioned in Chap. 3 of part 7 of the Act. Therefore, if a Province could be sued under Chap. 3 of part 7 of the Act, the suit could not be defeated merely because the Governor constitutes a part of the Provincial Government. When we turn to Chap. 3 of part 7 we find that one of the sections in that chapter is S. 176. Therefore, in all those cases in which the Secretary of State for India in Council could have been sued, the Provincial Government can also be sued notwithstanding the fact that the Provincial Government includes the Governor of the Province. The Advocate General has argued that the proviso to S. 306 refers to suits against the Province of Bombay within the meaning of S. 176, and although a suit may be filed against the Province of Bombay in those cases in which a suit could have been filed against the Secretary of State for India in Council, a writ cannot be issued against the Province. A distinction is sought to be made

between suits and the issuing of a high prerogative writ like the writ of *certiorari*. Now in the first place S. 176 does not speak of suits at all. It merely speaks of the Provincial Government suing or being sued, and in my opinion it would be wholly wrong to construe the expression "sue or be sued" in a narrow technical sense as referring only to those proceedings in a Court of law which can be initiated by the filing of a plaint. "To sue" in this context can only mean to claim a civil right in a Court of law by any legal procedure by which that civil right can be established. A writ of *certiorari* can only be obtained by means of a petition and not by means of filing a plaint. But what the petitioner is doing is claiming his civil right by means of this particular procedure which is the only procedure open to him in order to obtain the writ of *certiorari*. Tyabji J. in *Vajeram v. Purshottumdas*, 7 Bom. L. R. 138, construed the expression "suing" as occurring in S. 43, Civil P. C. of 1882, corresponding to O. 2, R. 2 of the present Code, as making a legal claim or taking legal proceedings against any person. In that learned Judge's opinion it did not necessarily mean to file a suit by means of a plaint such as is referred to in the Civil Procedure Code. In *In re Waterloo Life &c. Assurance Co. (No. 1)*, (1862) 31 Beav. 586: (135 R. R. 555), the question that arose was whether filing a petition amounted to suing, and the Court held that it did. The company was incapable of suing by S. 210, Companies Act and the Court took the view that that incapacity also applied to the presentation of a petition.

[13] It is interesting to note that the corresponding section in the Government of India Act, 1915, S. 110, gave immunity not only to the Governor but to the members of the Executive Council and also, subsequently by an amendment, to the Ministers, but that immunity only extended as far as the original civil or criminal jurisdiction was concerned. It is significant to note that there was no proviso to S. 110 corresponding to the proviso to S. 306, and the reason for it is obvious, because under the Government of India Act of 1915 the juristic person to be sued was not the Province but the Secretary of State for India in Council. Therefore, in my opinion, if a writ of *certiorari* can lie against the Province of Bombay, there is nothing in S. 306 which debars the Court from issuing such a writ.

[14] It is then argued that apart from S. 306 the High Court has no jurisdiction to issue a writ against the Province of Bombay. The jurisdiction that the High Court has is to be found in S. 223, Government of India Act, and that jurisdiction is the same as it was immediately before

the establishment of the Dominion, and before the Independence Act it was the same as it was at the time the Government of India Act, 1935, was enacted. Therefore, we have to go back to S. 106, Government of India Act, 1915, and there again we find that the jurisdiction conferred upon the High Court was the same as was vested in it at the commencement of that Act. In order to find out what that jurisdiction was, we have to turn to the High Courts Act of 1861, and S. 9 of that Act confers upon the High Courts established by that Act all the jurisdiction and power and authority which was vested in any of the Courts in the Presidency which was abolished by the High Courts Act. The Court that was abolished by the High Courts Act in Bombay was the Supreme Court to which the High Court succeeded. Therefore, in order to determine what the jurisdiction of the High Court is, we have really to ascertain what was the jurisdiction of the Supreme Court. Now, the Supreme Court was established in Bombay in 1823 by 4 Geo. IV, C. 71. That Act provided that it shall be lawful for His Majesty to establish a Supreme Court of Judicature at Bombay with full power to exercise such jurisdiction and to be invested with such power and authorities, privileges and immunities and subject to the same limitations, restrictions and control within the said town of Bombay and territories dependent upon the Government of Bombay as the said Supreme Court of Judicature at Fort William in Bengal is invested with or subject to within the said Fort William or within the Kingdoms or the Provinces of Bihar and Orissa. That Act further provided that the Governor and Council at Bombay, and the Governor-General of Fort William aforesaid shall enjoy the same exemption, and no other, from the authority of the Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid from the jurisdiction of the Supreme Court of Judicature there already by law established. Therefore, the jurisdiction which was to be conferred upon the Supreme Court was to be identical with that of the Supreme Court at Calcutta and the Governor of Bombay was to enjoy the same immunity as the Governor-General enjoyed at Fort William. Now, the Supreme Court at Fort William was established under the Act of 1772, 13 Geo. III, C. 63. Pursuant to this Act, Letters Patent establishing the Supreme Court were issued in 1774. It is a historical fact that here was a conflict between the Judges of the Supreme Court and the executive Government, and in order to avoid any future conflict the Act of 1780 exempted the Governor-General and Council of Bengal from the jurisdic-

tion of the Supreme Court. It also exempted any person or persons who acted under the orders of the Governor-General and Council. But it provided that where an order or orders of the Governor-General and Council extended to any British subject or subjects, the Court shall have and retain full and complete jurisdiction. Now, when we turn to the Charter of the Supreme Court, we find that under cl. 25 immunity is given to the person of the Governor of Bombay and his Council. But we do not find the proviso which entitled British subjects to question the orders of the Governor. An interesting argument was advanced before us by the Advocate-General as to whether the proviso only applied to the acts done by persons under the authority of the Governor or also applied to the acts of the Governor himself, and also whether the right that the British subjects had under that proviso would now apply to all Indian subjects because the distinction between European British subjects and Indian British subjects no longer prevails. It is unnecessary to decide what the correct position is, because, in my opinion, the immunity given to the Governor under the various provisions to which I have referred is a personal immunity no higher than the immunity to be found under S. 306, Government of India Act. The real jurisdiction of the High Court to issue a writ is to be found in cl. 5, Letters Patent establishing the Supreme Court, and that jurisdiction is similar to the jurisdiction exercisable by the Judges of the King's Bench Division. Therefore, if we find that a writ of *certiorari* could be issued by the King's Bench Division against the East India Co., such a writ could also be issued by the Supreme Court, and if the Supreme Court could issue it, the High Court today has the same jurisdiction to issue such a writ. There is nothing whatever to suggest that the King's Bench Division in proper cases could not have issued a writ against the East India Co. On the contrary, there are cases which go to show that writs of mandamus were actually issued by the English Courts against the East India Co. See *The King v. Directors of the East India Co.*, (1815) 4 M. & S. 279, where the writ of mandamus was issued against the East India Co., and again *The King v. Directors of the East India Co.*, (1833) 4 B. & Ad. 530, where also a writ of mandamus was issued against the East India Co., and an interesting case reported in *Ex parte Sir Charles Napier*, (1852) 21 L. J. Q. B. (N.S.) 332, where a writ of mandamus was asked for against the East India Co. at the instance of Sir Charles Napier in respect of his salary.

[15] There is one further argument of the Advocate-General to which I would like to refer.

He relies on the meaning of "the Province of Bombay" as given in the General Clauses Act. Before the Independence Act the meaning given to "Provincial Government" under the General Clauses Act was

"in a Governor's Province, the Governor acting or not acting in his discretion and exercising or not exercising his individual judgment according to the provision in that behalf made by and under the said Act."

After India became independent, the India Adaptation of Existing Indian Laws Order, 1947, was passed, and the following definition for "Provincial Government" was substituted:

"As respects anything done or to be done after the establishment of the Dominion of India shall mean in the Governor's Province the Governor."

It is, therefore, argued by the Advocate-General that when S. 3, Requisition Ordinance speaks of Provincial Government, it means the Governor, and the Governor is exempt from being sued under S. 306. In my opinion, the expression "Governor" used in the General Clauses Act as equivalent to "Provincial Government" does not refer to the Governor in his personal or individual capacity, but to the constitutional Governor who is the head of the Provincial executive and in whose name all the executive authority of the Province is exercised. As I have already considered earlier, the exemption under S. 306 does not apply to the Governor in the sense in which this expression is used in the General Clauses Act.

[16] I would now like to consider three decisions of the Madras High Court and one decision of the Calcutta High Court, on which strong reliance has been placed by the Advocate-General for the proposition that a writ of *certiorari* does not lie against the Provincial Government. The first is *Venkataratnam v. Secretary of State for India*, 53 Mad. 979 : (A.I.R. (17) 1930 Mad. 896). In this case, a writ of *certiorari* was applied for against the Minister of Public Health. The Madras High Court was considering the provisions of the Government of India Act of 1915. They took the view that under S. 110, Government of India Act, the original jurisdiction of the High Court was ousted as against the Governor and the Ministers. They also took the view that the jurisdiction of the Madras High Court was the same as the jurisdiction of the Supreme Court at Calcutta. By the Act of 1780 the Supreme Court had no jurisdiction to proceed against the Governor. The Court did not consider the distinction between suing the Governor or a Minister personally and suing the Province of Bombay as a juristic body in respect of those matters for which the East India Co. could have been sued. We in the case before us are more concerned to consider the effect of the

proviso to S. 306 and S. 176, Government of India Act. The next case is *Thyagarajan v. Government of Madras*, I. L. R. (1940) 53 Mad. 204 : (A. I. R. (26) 1939 Mad. 940). In that case Lionel Leach C.J. and Kunhi Raman J. refused to issue a writ against the Provincial Government of Madras holding that no differentiation could be made between the Governor and the Provincial Government, and the Governor was exempt under S. 306, Government of India Act. With very great respect to the learned Judges who decided that case, they completely overlooked the existence of the proviso to S. 306. Then there is a recent decision of the Madras High Court reported in *Kandaswami v. Province of Madras*, I. L. R. (1948) Mad. 283 : (A. I. R. (34) 1947 Mad. 443). That Court came to the same conclusion, as in *Thyagarajan v. Government of Madras*, I. L. R. (1940) 53 Mad. 204 : (A. I. R. (26) 1939 Mad. 940), that a writ did not lie against the Province of Madras. Although the proviso to S. 306 was cited before the Court, it was conceded by counsel for the petitioner that it had no application. It is difficult to understand why that proviso had no application. Dealing with the proviso, the learned Chief Justice says (p. 292):

"The proviso to sub-s. (1) of S. 306 contemplates that the protection which is given enures to the Governor's acts in relation to his Provincial Government, since, express reservation is made that nothing in the sub-section shall restrict the right of any person to bring against a province such proceedings as are mentioned in Chap. III of Part VII, Constitution Act. There would be no need for such reservation if the protection given by the sub-section did not enure to the acts of a Governor in relation to his Provincial Government." With respect, as I have already pointed out, the proviso to S. 306 is not a proviso in the ordinary sense of the term. It is enacted only for greater caution and it is a warning given to Courts not to restrict the right of the subject to sue the Provincial Government by reason of any immunity given to the Governor by S. 306, sub-s. (1). The learned Chief Justice has also not considered the effect of S. 176, and whether a writ could not have lain against the East India Co. and if so whether a writ could not equally well lie against the Provincial Government. Now turning to the Calcutta case in *In re Banwarilal Roy*, 48 C. W. N. 766, Amir Ali Ag. C. J. and Das J. held that the High Court had no jurisdiction to issue a writ of *certiorari* against the Province of Bengal. Das J. delivered the leading judgment and he took the view that to accede to the application for issue of a writ of *certiorari* against the Government of Bengal would inevitably mean issuing process against the Governor, for he is at least a part of the Government of Bengal. This learned Judge also did not consider the effect of the proviso to S. 306. Further, he

was considerably influenced by the fact that the Charter of the Supreme Court of Fort William of 1774 contained cl. 13 which set out the various proceedings which the Court at Calcutta was empowered to hear, and according to the learned Judge a writ of *certiorari* was not one of such proceedings and according to him the High Court of Madras had the same jurisdiction that was conferred upon the Supreme Court at Fort William. But with respect, the learned Judge did not attach sufficient importance to cl. 4 of that Charter which conferred upon that Supreme Court the same jurisdiction as the King's Bench Division had in England. I would, therefore, with very great respect, not follow the Madras High Court and the Calcutta High Court in the view they have taken with regard to the jurisdiction of the High Court to issue a writ of *certiorari* against the respective Provincial Governments. The judgment of Coyajee J. in *Lady Dinbai Petit v. Noronha*, 47 Bom. L. R. 500 : (A. I. R. (32) 1945 Bom. 419), to the same effect must also be held to have not been correctly decided.

[17] Coming now to the merits of the case, I am afraid there is very little that can be said in favour of Government. No attempt whatever was made by counsel for Government to establish before Bhagwati J. that the premises in suit were requisitioned for any public purpose. As I have pointed out earlier, the jurisdiction of the Government to requisition any land is conditioned by the land being required for a public purpose. If Government requisitions land for a purpose which is not a public purpose, it would be acting in excess of its jurisdiction. All that the record shows is that Government wanted to deprive one refugee from Sind of the premises of which he was in possession in order to give them to another refugee. Now, the housing of refugees may certainly be a public purpose, but it cannot be said that if you choose one refugee as against another without any ostensible cause, that by itself would constitute public purpose for which a land can be requisitioned. I do not quite agree with Bhagwati J. when he suggests that if Government wishes to secure a house for an individual it would not necessarily constitute public purpose. The purpose for which land has to be requisitioned must involve some benefit to the community as a whole. But there may be cases where securing a house for an individual may itself confer a benefit upon the community. Each case, therefore, must be determined upon its own facts and circumstances. In this case I am satisfied that Government have not requisitioned the premises for any public purpose and therefore the requisition order made by them is in excess of their jurisdiction.

[18] Bhagwati J. has also taken the view that the order is bad because it was served on the two other assignees in whose favour along with the petitioner the assignment of the tenancy was made. Section 11 of the Ordinance provides that every order made under S. 3 shall be served, if it is an order affecting an individual person, on the person in the manner provided. Sub-section (2) provides that when a question arises whether a person was duly informed of an order made under the Ordinance, compliance with the requirements of sub s. (1) would be conclusive proof that he was so informed, but failure to comply with the said requirements shall not preclude proof by other means that he was so informed or affect the validity of the order. Therefore, it is clear that the validity of the order under S. 3 does not depend upon its service upon all the persons affected by that order. The most that could be said would be that a particular order would not be effective against any person unless it was served upon him. The order has been served upon the petitioner and therefore it is not competent to him to say that the order is not valid or is not enforceable as against him. With respect, therefore, I do not agree with Bhagwati J. when he holds that the order was not in accordance with law because it was not served upon the other two assignees. Bhagwati J. has also taken the view that the order was bad because it was not addressed to the petitioner and his co-assignees. With respect, I do not agree with that view. Section 3 of the Ordinance does not require that the requisitioning order should be addressed to any person.

[19] The Advocate-General has made a grievance of the fact that Bhagwati J., after he allowed the petitioner to amend the petition by bringing respondents 2 and 3 on the record, did not make the petitioner to pay all the costs of the petition up to the date of the amendment. The learned Judge only awarded Rs. 120 as costs to respondent 1. It is very rarely that the Court of appeal interferes with an order of costs made by the trial Court which is purely discretionary, and in this case we see no special grounds why we should interfere with the order.

[20] The result, therefore, will be that the judgment of the learned Judge will be affirmed as against appellant 2 and the appeal will be dismissed. With regard to appellants 1 and 3, the order of the learned Judge will be set aside and the appeal allowed.

[21] As regards the costs of the petition, the costs will be paid by the Province of Bombay and not by all the respondents, as directed by the learned trial Judge. As far as the costs of the appeal are concerned, the respondents have substantially succeeded and therefore the appel-

lant must pay the costs of the appeal. Costs will be taxed on the basis of a long cause scale, with two counsel certified. Certificate under S. 205, Government of India Act to issue.

[22] **Tendolker J.**—I have had the benefit of perusing the judgment of my Lord the Chief Justice with which I am in agreement. I shall not, therefore, restate the facts giving rise to this appeal, nor deal with the minor points involved in its decision, but will restrict my judgment to the main questions of law that arise for determination. They are: (1) Whether the act of requisition under S. 3, Bombay Land Requisition Ordinance, (Ordinance V [5] of 1947) is a quasi-judicial act, and (2) whether a writ of *certiorari* lies against the Province.

[23] The question as to what is a quasi-judicial act, as distinguished from a ministerial, administrative or executive act, has been the subject of numerous decisions both in Great Britain and in India; and I will attempt to review them in brief in an endeavour to extract a ratio from them for the determination of this usually difficult and vexed question. The observations of May C. J. in *The Queen v. Corporation of Dublin*, (1878) 2 L. R. Ir. 371 appear to me to be the foundation of many subsequent decisions. In that case the Dublin Corporation levied a borough rate as the borough fund was found to be insufficient for the legitimate purposes of the Corporation. This state of affairs had arisen by reason of illegal payments having been made out of the borough fund. It was held upon a writ of *certiorari* that the rate was illegal and that all orders and resolutions of the Corporation imposing it and the precepts to levy it should be quashed. May C. J. observed (p. 376):

"It is established that the writ of *certiorari* does not lie to remove an order merely ministerial, such as a warrant, but it lies to remove and adjudicate upon the validity of acts judicial. In this connexion the term 'judicial' does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for the purpose of this question a judicial act seems to be an act done by competent authority, upon consideration of facts and circumstances, and imposing liability or affecting the rights of others."

[24] These observations of May C. J. were approved, subject to the proviso, that the statute which confers the power does not indicate a contrary intention, by Pales C. B. in *Reg. (Wexford Co. Council) v. Local Govt. Board*, (1902) L. R. 2 Ir. 349, where the Chief Baron stated (p. 373):

"... I have no hesitation in saying that I have always considered, and still consider, the principle of law to be as stated by the Chief Justice, assuming that there is nothing in the statute constituting the particular tribunal or investing it with the particular power which indicates a contrary intention. I have always thought that to erect a tribunal into a 'Court' or 'jurisdiction,' so as to make its determinations judicial, the

essential element is that it should have power, by its *determination* within jurisdiction, to impose liability or affect rights. By this I mean that the liability is imposed, or the right affected by the determination only, and not by the fact determined, and so that the liability will exist, or the right will be affected, although the determination be wrong in law or in fact. It is otherwise of a ministerial power. If the existence of such a power depends upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind. The happening of the contingency may be questioned in an action brought to try the legality of the act done under the alleged exercise of the power. But where the determination binds, although it is based on an erroneous view of the facts or law, then the power authorising it is judicial."

[25] The observations of May C. J. were quoted by Lord Atkinson in *Frome United Breweries Co. v. Bath Justices*, (1926) A. C. 586 (p. 602): (95 L. J. K. B. 730), as "one of the best definitions of a judicial act as distinguished from an administrative act." The dicta appear also to have been approved by Lord Greene M. R. in *Rex v. Archbishop of Canterbury: Ex parte Morant*, (1944) 1 K. B. 282: (113 L. J. K. B. 179), where the Master of the Rolls observes as follows (p. 291):

"The second way in which the case was presented did not depend on the existence of a contest or lis. It was said: Here is a piece of legislation with statutory force which may deprive the owner of property, to wit, the patron, of some of his rights, in respect of that property, and wherever a person or body of persons is given power to deprive a person of, or to affect, his rights, there is a statutory obligation to act in a quasi-judicial manner with all the consequences which that implies. In support of that proposition a number of well-known authorities were cited relating to such matters as closing orders, clearance orders, and things of that kind, with the principles of which we are all very familiar, but, in my opinion, none of those authorities is of any assistance in this case. The question we have to decide is not some general or abstract question of principle, but the construction of a particular piece of legislation dealing with a very special subject-matter."

[26] Leaving then the cases in which the dicta of May C. J. were specifically approved, we next have in order of date the case of *Rex v. Woodhouse*, (1906) 2 K. B. 501: (75 L. J. K. B. 745), where Fletcher-Moulton L.J. observed as follows (p. 535):

"... the procedure of *certiorari* applies in many cases in which the body whose acts are criticized would not ordinarily be called a Court, nor would its acts be ordinarily termed 'judicial acts.' The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law."

It seems to me that the word "right" is here used as synonymous with "duty," for obviously there can be no duty to decide without a right

to do so. But I do not think that the learned Law Lord intended to lay down that if there was a right to decide, without a corresponding duty, the act was judicial. Many ministerial acts involve the exercise of a right to decide as opposed to a duty to decide.

[27] The next case in order of date is *Rex v. Electricity Commissioners : London Electricity Joint Committee Co.*, (1920), *Ex parte*, (1924) 1 K.B. 171 : (93 L. J. K. B. 390) where Lord Atkin L. J. formulated the test for determining what is a quasi-judicial act, as follows (p. 205) :

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

Here again we get the legal authority to determine coupled with a duty. The emphasis to my mind is on "the duty to act judicially."

[28] The next case is *Rex v. London County Council etc.*, (1931) 2 K. B. 215 : (100 L. J. K. B. 760), where Scrutton L. J. stated as follows (p. 233) :

"There has been a great deal of discussion and a large number of cases extending the meaning of 'Court.' It is not necessary that it should be a Court in the sense in which this Court is a Court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a Court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of certiorari."

The words "after hearing evidence" occurring in this passage do not to my mind mean anything more than "upon consideration of facts and circumstances" as May C. J. puts it, and do not necessarily involve the power to examine witnesses or to compel production of documents. As Lord Loreburn observed in *Board of Education v. Rice*, (1911) A. C. 179 at p. 182 : (80 L. J. K. B. 796) :

"They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

It is also material to note the emphasis on "the duty to decide between a proposal and an opposition." The words used are "has to" which clearly imply a duty. In the same case *Rex v. London County Council*, (1931-2 K. B. 215 : 100 L.J.K.B. 760), Lord Slesser L. J. at p. 243 quotes with approval the dicta of Atkin L. J. in *Rex v. Electricity Commissioners*, (1924-1 K. B. 171 : 93 L. J. K. B. 390) and proceeds to apply them to the facts of the case.

[29] We next have the case of *Cooper v. Wilson*, (1937) 2 K. B. 309 : (1937-2 ALL E. R. 726), where Scott L. J. states as follows (p. 340) :

"In the Report of the Ministers' Powers Committee . . . an attempt was made to define the words 'judi-

cial' and 'quasi-judicial'; 'A true judicial decision presupposes an existing dispute between two or more parties, and then involves four requisites : (1) The presentation (not necessarily orally) of their case by the parties to the dispute ; (2) if the dispute between them is a question of fact, the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal argument by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law. A quasi-judicial decision equally presupposes an existing dispute between two or more parties and involves (1) and (2), but does not necessarily involve (3) and never involves (4). The place of (4) is in fact taken by administrative action, the character of which is determined by the Minister's free choice.' Broadly speaking I think the above definitions there given are correct"

This was an action for a declaration that the plaintiff who was an ex-sergeant in the police force had not been validly dismissed. The dismissal was challenged on the ground that the procedure followed was contrary to natural justice. In this connection Scott L. J. considered the distinction between a judicial and a quasi-judicial act, and not, be it noted, between a quasi-judicial and a ministerial act. The tests laid down were sufficient for the purposes of the case in which there admittedly were two parties and a fact to be determined; but I do not think that these observations were intended to formulate precise conditions which an act must satisfy before it can be dealt with by a writ of certiorari.

[30] Lastly, we have the case of *R. v. Boycott*, (1939) 2 ALL E. R. 626; 1939-2 K.B. 651). The facts of this case are material. Under the Mental Deficiency Act 1913, it was one of the duties of the local education authority to make arrangements for ascertaining what children were "defective". The Act further provided that in case of doubt the matter should be determined by the Board of Education. A lad of eleven was examined by Dr. Boycott, the certifying medical officer, who made a report that the lad was an imbecile and not educable at a special school. On the same day a certificate was issued under the Act to the same effect under the signatures of Dr. Boycott and Dr. Hyslop Thomson, described as the School Medical Officer who, it was admitted, had never seen the lad. A few days later, a clerk of the Education Committee addressed a letter to the clerk of the Mental Deficiency Act, forwarding a copy of the report and requesting further action thereon. The report, the certificate and the letter were all sought to be quashed by a writ of certiorari at the instance of the lad's father, who had the lad examined by his own doctor who held him not

to be an imbecile, an opinion which was subsequently endorsed by a specialist. It was contended on behalf of the respondents that the three documents were exemplifications of administrative acts and not quasi-judicial acts. The contention was overruled. Hewart L. C. J. accepted the tests of a quasi-judicial act laid down by Lord Atkin L. J. and proceeded to observe as follows (p. 631):

"In my opinion, on the facts of this case, this certificate of 5th October 1938, created in the way in which we know that it was created, purported to be and to look like the decision of a quasi-judicial authority, and I think that similar considerations apply to the two documents one also dated 5th October, and the other dated 10th October, which it is contended (and I think rightly contended) ought to be regarded as part and parcel of one and the same transaction. I think that these three documents do come within the range of the jurisdiction of this Court in *certiorari*."

It is to be noted that in this case there was no *lis inter partes*.

[31] A review of these cases leads me to the conclusion that the observations of Palles C. B., in *Reg. (Wexford County Council) v. Local Government Board*: (1902 L. R. 2 Ir. 349) lay down what I consider to be a fundamental principle which is not in any way modified by any subsequent decisions. That principle is that if the power to do an act imposing liability or affecting a right of any person is subject to a condition precedent which requires determination, as opposed to a condition which is capable of physical demonstration, the power to do that act must be judicially exercised, unless the statute conferring the power indicates a contrary intention. In determining whether there is a contrary intention the provisions of the statute have got to be carefully scrutinised. Where the power to do an act is not subject to a condition precedent, in order to constitute a judicial or quasi-judicial act there must be (1) the authority to impose a liability or affect the right of any person, (2) the existence of a contest or *lis* as exemplified by a proposal and an opposition, and (3) a duty to decide judicially upon consideration of facts and circumstances. The second of these conditions has sometimes been loosely expressed by saying that there must be two parties. The word "parties" is to my mind here used as meaning "sides" and not necessarily "juristic persons," for there are in the law reports several cases where writs have been issued in connection with licenses to run a wine shop, or a cinema, or closing orders, clearance orders and things of that kind in respect of which there are no two parties.

[32] Coming next to Indian cases, in *In re Banwarilal Roy*, 48 C. W. N. 766, Das J., after referring to English decisions and particularly to the observations of Atkin L. J., proceeds to observe as follows (p. 800):

"The real test appears to me to be the third condition which imposes on the authority the duty to 'act' judicially. The duty of 'acting' judicially or 'proceeding' judicially implies, to my mind, something more than mere application of the mind by the authority on the materials before him. If he does not apply his mind at all or does the act for a collateral purpose, it will be bad act in all cases. If the doing of the act is left entirely to the discretion of the authority as a purely subjective matter as said in *Liversidge v. Anderson*, (1942 A. C. 206: 110 L. J. K. B. 724) or if the official act is 'discretionary and in some respects facultative' as their Lordships of the Judicial Committee put it in *Beasant's** case, it is purely an administrative or executive act. In such a case the authority alone has to form his own opinion, in good faith of course, on the materials before him. A judicial or quasi-judicial act, on the other hand, implies more than mere application of the mind or the formation of the opinion. It has reference to the mode or manner in which that opinion is formed. It implies "a proposal and an opposition" and a decision on the issue. It vaguely connotes "hearing evidence and opposition" as Scrutton L. J., expressed it. The degree of formality of the procedure as to receiving or hearing evidence may be more or less according to the requirements of the particular statute, but there is an undefinable yet an appreciable difference between the method of doing an administrative or executive act and a judicial or quasi-judicial act."

[33] All these decisions were reviewed in an exhaustive judgment by my learned brother Bhagwati J. in *Juggilal Kamlatpat v. Collector of Bombay*, 47 Bom. L. R. 1070: (A.I.R. (B) 1946 Bom. 280). That was a case in which a flat had been requisitioned by the Provincial Government under R. 75-A, Defence of India Rules. The learned Judge held that that was a quasi-judicial act. After pointing out that certain sub-rules of R. 75-A conferred upon the Provincial Government power to gather materials which would enable them to determine whether to requisition the premises or not, the learned Judge mainly relied upon what he described as the "mandatory provisions" of S. 15, Defence of India Act in order to hold that there was a duty to decide judicially. Section 15, Defence of India Act is in these terms:

"Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of British India."

To my mind this section merely embodies a fundamental and well-recognised principle of British jurisprudence; and with respect to the learned Judge, it seems to me impossible to find in that principle a duty to decide judicially. The principle is quite consistent with the discharge of executive, administrative or ministerial functions. It may, however, be that the learned Judge in that case came to the right conclusion because it is quite possible to read R. 75-A (1) as conferring a power to requisition, which is subject to a condition precedent; and within the ratio which I have at-

* A. I. R. (6) 1919 P. C. 31 : 46 I. A. 176 (P.C.).

tempted to set out above, the act of requisition would be a quasi-judicial act. It is not necessary to decide it in the present case.

[34] We next have a decision of Kania J. (as he then was) in *Kaikhushru Sorabji v. Commissioner of Police, Bombay*, 48 Bom. L. R. 717; (A. I. R. (34) 1947 Bom. 153). In that case, an order passed under the Defence of India Rules requiring that a particular telephone connection be cut off was sought to be quashed by a writ of *certiorari*. Rule 17 (i) (a), (ii) (a), which conferred the power on the requisite authority did not make the exercise of that power subject to any condition precedent. Reliance was placed on behalf of the petitioner on S. 15, Defence of India Act and upon the judgment of Bhagwati J. in *Juggilal Kamlatpat v. Collector of Bombay*, (47 Bom. L. R. 1070; A. I. R. (33) 1946 Bom. 280). As the judgment was then the subject-matter of an appeal to the Federal Court — which incidentally was subsequently abandoned — the learned Judge expressed no opinion on that judgment; but negatived the contention that a duty to act judicially was to be found in S. 15, Defence of India Act, for if it was, every act under the Defence of India Rules would necessarily be a quasi-judicial act. The learned Judge further observed as follows (p. 720) :

"It appears to me that unless the authority invested with the power to pass an order had to act judicially, i.e., to weigh a question from two sides and decide on the matter, no question of quasi-judicial act can arise. The two sides cannot include himself as he is the deciding authority."

This passage has been strongly relied upon by the Advocate-General as laying down two propositions, viz., that in order to constitute a quasi-judicial act there must be (1) two parties and (2) the deciding authority cannot be one of these parties. With great respect to the learned Judge, I do not think that when the learned Judge refers to "two sides" the learned Judge could have intended to mean two parties in the sense necessarily of two juristic persons. All that he could have meant was two sides, as exemplified by a proposal and an opposition. That to my mind appears clearly from a subsequent passage in the same judgment where the learned Judge says (p. 720) :

"In the present case, in my opinion, the act of the respondent in making the order is not quasi-judicial. He has not to consider a proposition and opposition. He has not to weigh different facts and/or law and decide whether the order should be made or not."

If that be the correct interpretation, I do not think that any question arises of the deciding authority being one of the parties. Again, with respect, assuming that the existence of two juristic persons was requisite, I do not see why the Legislature cannot confer upon one of such parties the power to decide judicially as between

himself and the other. When he exercises such powers he ceases to be a party and must act judicially.

[35] Applying the ratio I have attempted to set out to the act of requisition under the Ordinance, the first section we have to construe is S. 3. It is in these terms :

"If in the opinion of the Provincial Government it is necessary or expedient to do so, the Provincial Government may by an order in writing requisition any land for any public purpose."

As I read this section, while the necessity or expediency of requisitioning is a matter for the opinion of the Provincial Government, the existence of a public purpose is a condition precedent to the exercise of the power to requisition. The words "to do so" refer to the nature of the act, viz., "to requisition," and not to the purpose for which the act is done. If it were not intended that a public purpose should exist before the power to requisition can be exercised, the words "for any public purpose" would be redundant, or in any event the words would have been, as they now are in S. 5, Bombay Land Requisition Act, 1948, "for any purpose." Whether a public purpose exists is a matter to be determined and not a fact of mere physical observation, for quite obviously the existence or otherwise of a public purpose is a mixed question of fact and law. The act of requisition is, therefore, a quasi-judicial act, unless the Ordinance indicates an intention to the contrary. Apart from the words of S. 3, the Advocate-General has not relied on any other provisions of the Ordinance as indicating a contrary intention. On the other hand, provisions of Ss. 10 and 12 have been relied upon by Sir Jamshedji Kanga as indicating that the intention was that it should be a quasi-judicial act. I am not persuaded that it is so. Section 10 (1) of the Ordinance provides that the Provincial Government "may" obtain certain information "with a view to carrying out the purposes of the Ordinance." Sir Jamshedji contends that the word "may" in this section should be understood as meaning "must" and it casts an obligation on the Provincial Government to hold an enquiry. Maxwell in his *Interpretation of Statutes* (9th Edn.), p. 246, considers when "may" means "must" :

"Statutes which authorise persons to do acts for the benefit of others, or, as it is sometimes said, for the public good or the advancement of justice, have often given rise to controversy when conferring the authority in terms simply enabling and not mandatory. In enacting that they 'may' or 'shall,' if they think fit, or 'shall have power,' or that 'it shall be lawful' for them to do such acts, a statute appears to use the language of mere permission, but it has been so often decided as to have become an axiom that in such cases such expressions may have — to say the least — a compulsory force, and so would seem to be modified by judicial exposition. On the other hand, in some cases,

the authorised person is invested with a discretion, and then those expressions seem divested of that compulsory force, and probably that is the *prima facie* meaning."

Therefore, "may" will mean "must" only if the Provincial Government is not invested with a discretion. That is really begging the whole question.

[36] Section 12 confers upon the Provincial Government authority to empower any person to enter upon and into premises for certain purposes. In my opinion the provisions of both these sections are by themselves quite consistent with the performance of an executive as well as a quasi-judicial act, and the Ordinance contains no indication that the act of requisitioning under S. 3 shall be a purely ministerial act. I therefore hold that the act of requisitioning under S. 3 of the Ordinance is a quasi-judicial act and can be questioned by a writ of certiorari.

[37] Regarding the second question of law involved in this appeal the argument that no writ of certiorari or prohibition lies against the Provincial Government has been advanced by the Advocate-General under three heads: (1) Any act of the Provincial Government is an act of State being the act of a sovereign and cannot be questioned in the sovereign's own Courts. (2) High Courts, never had jurisdiction to entertain a writ against the Provincial Government, and (3) there is immunity conferred by law on the Governor and therefore on the Provincial Government.

[38] Dealing with the first ground, such a plea was, so far as I am aware, raised for the first time in 1859 in the case of *Secretary of State for India v. Kamachee Boye Saheba*, 7 M. I. A. 476 : (13 Moo. P. C. 22). In that case upon the death without issue of the Raja of Tanjore, who was a sovereign in treaty relations with the East India Company, the directors of the Company declared the raj to have lapsed to the British Government; and with the concurrence of the Central Government the Government of Madras appointed one Mr. Forbes Special Commissioner for the purpose of dealing with the questions arising out of the extinction of the raj. Mr. Forbes took possession of both the public and the private property of the Raja and proceeded to prepare lists of the properties with a view to selling the same. The widow of the Raja filed a bill in the Supreme Court of Madras against the East India Company and the Court granted an injunction restraining Mr. Forbes from proceeding with the sale. The East India Company insisted that the seizing of the property was an act of State and that the Supreme Court could not inquire into it. Lord Kingsdown delivering the judgment of their

Lordships of the Privy Council quoted with approval the observations of Tindal C. J. in *Gibson v. East India Co.*, (1839) 5 Bing. N. C. 262 : (8 L. J. (N. S.) C. P. 193), which are as follows (p. 273) :

"It is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown to be exercised by the Board of Commissioners for the affairs of India) power to acquire, and retain, and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the native powers of India." and proceeded to observe (p. 531) :

"That acts done in the execution of these Sovereign powers were not subject to the control of the municipal Courts, either of India or Great Britain, was sufficiently established by the cases of *The Nabob of Arcot v. East India Co.*, in the Court of Chancery, in the year 1793; and *East India Co. v. Syed Ally*, 7 M. I. A. 555 : (1 Sar 867 P. C.) before the Privy Council in 1827."

[39] His Lordship further stated (p. 531) :

"The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Raja of Tanjore in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course has no foundation."

[40] These observations of their Lordships lay down the true test as to what acts of a Sovereign cannot be questioned in his Courts. They are acts of State strictly so called—"acts not affecting to justify themselves on grounds of municipal law,"—but where the act is done under colour of legal title, it may be questioned in the municipal Courts.

[41] We next have in 1861 a judgment of the Supreme Court at Calcutta in *P. & O. S. N. Co. v. Secretary of State for India*, 5 Bom. H. C. (App.) 1. This was a suit against the Secretary of State for damages caused by the negligence of the servants of Government. Sir Barnes Peacock C. J., held that such a suit was competent. At p. 9 the learned Chief Justice observed as follows :

"In determining the question whether the East India Company would, under the circumstances, have been liable to an action, the general principles applicable to Sovereigns and States, and the reasoning deduced from the maxim of the English law that the King can do no wrong, would have no force. We concur entirely in the opinion expressed by Grey C. J., in the case of *Bank of Bengal v. United Company*, (Bignell, Rep., p. 120), which was cited in the argument, that the fact of the Company's having been invested with powers usually called sovereign powers did not constitute them sovereigns."

There are, however, certain passages in the judgment which have given rise to a good deal of misapprehension and on which many subsequent decisions of the Indian Courts have been

based, e. g., the learned Chief Justice observed at p. 13 as follows :

"There is a great and clear distinction between acts done in the exercise of what are usually termed sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

Then at p. 14 it is observed as follows :

"But where an act is done, or a contract is entered into, in the exercise of powers usually called sovereign powers, by which we mean powers which cannot be lawfully exercised except by a sovereign, or private individual delegated by a sovereign to exercise them, no action will lie."

These passages have been understood to mean that while the East India Company could be sued in respect of its commercial dealings, it could not be sued in respect of any acts done by it in discharge of rights of sovereignty delegated to them. While the former proposition is indisputable, the latter is only partially true. In respect of acts of State strictly so called the Company is no doubt not liable; but the immunity does not extend to acts done under colour of legal title, although they may be acts in discharge of governmental functions in exercise of the rights of sovereignty delegated to the Company. This fact has been overlooked in interpreting these passages in the judgment; and in my opinion no useful purpose will be served by referring to several decisions of the Indian Courts in which this has been done.

[42] In *Forester v. Secretary of State for India in Council*, I. A. Sup. Vol 10 : (12 Beng. L. R. 120 P. C.), the facts were that upon the death of Begum Sumroo, a jaidadar under the Scindia Government resumed her lands. The resumption was challenged by one Dyce Sombre, who claimed under the Begum's will. Dealing with the defence that the act of resumption was an act of State Lord Hatherley L. C. quoted with approval the observations of Lord Kingsdown, and proceeded to observe as follows (page 17) :

"The act of Government in this case was not the seizure by arbitrary power of territories which up to that time had belonged to another sovereign state; it was the resumption of lands previously held from the Government under a particular tenure, upon the alleged determination of that tenure. The possession was taken under colour of a legal title; that title being the undoubted right of the sovereign power to resume, and retain or assess to the public revenue all lands within its territories upon the determination of the tenure, under which they may have been exceptionally held rent-free. If by means of the continuance of the tenure or for other cause, a right be claimed in derogation of this title of the Government, that claim, like any other arising between the Government and its subjects, would *prima facie* be cognizable by the municipal Courts of India."

[43] We next have a decision of this Court in *Jehangir v. Secretary of State for India*, om. L. R. 131. This was a suit by a dismissed

servant of the Government for damages for defamatory language used in the resolution of dismissal. Batty and Jacob JJ. agreed that the suit was maintainable, but differed as to the liability of the Secretary of State for tortious acts of his servants. The matter was referred to Chandavarkar J., who held that the Secretary of State was not so liable; but the learned Judge expressed no opinion as to the maintainability of the suit. Batty J., stated (p. 139) :

"For it appeared to my learned colleague as well as to myself, that though the appointment or dismissal of a certain class of officers is among the functions of a Government, and is not exercisable by private individuals as such, it is a power which is exercisable only in pursuance of an authority conferred and regulated by Municipal law and deriving its justification therefrom, and subject to limitations thereby imposed. It is a power not infrequently conferred on some *persona designata* by the Legislature. No doubt if the donee of the power acts within the powers conferred or is vested with final and exclusive discretion, the Court cannot interfere with the exercise of that power or substitute its own discretion for that of the authority so empowered. Yet the power is none the less one which must be exercised in conformity with the law and subject to all conditions and limitations which may have been imposed by the law, and if those conditions be not fulfilled or if those limitations be exceeded, the jurisdiction of the Courts is not ousted."

At p. 140 the learned Judge observed as follows :

"An act of State in respect of which the jurisdiction of the Courts is barred must be an act which does not purport to be done under colour of a legal title at all, and which could neither assert or violate any right conferable by law, but which must rest for its jurisdiction on considerations of external politics and interestal duties and rights."

[44] The same view was taken by the Madras High Court in the *Secretary of State for India v. Hari Bhanji*, 5 Mad. 273. This case related to the levy of a duty under a Tariff Act which was questioned. It was contended on behalf of the Secretary of State that the levy was an act of State, but that contention was negatived. Turner C. J. observed as follows (p. 279) :

"Acts done by the Government in the exercise of the sovereign powers of making peace and war and of concluding treaties obviously do not fall within the province of municipal law, and although in the administration of domestic affairs the Government ordinarily exercises powers which are regulated by that law, yet there are cases in which the supreme necessity of providing for the public safety compels the Government to acts which do not pretend to justify themselves by any canon of municipal law."

Acts thus done in the exercise of sovereign powers but which do not profess to be justified by municipal law are what we understand to be the acts of state of which municipal Courts are not authorised to take cognizance."

Lastly, we have a comparatively recent decision of their Lordships of the Privy Council in *Eshugbayi Eleko v. Government of Nigeria (Officer Administering)* 1931 A.C. 662: (A. I. R. (18) 1931 P. C. 248). The Governor of Nigeria, purporting to act under the Deposed Chiefs

Removal Ordinance, ordered the deposed chief to leave a specified area. As the order was not obeyed, the Governor made an order of deportation under which the chief was arrested. The chief obtained a rule *nisi* for a writ of *habeas corpus*, and one of the pleas of the Governor of Nigeria was that it was an act of State and it could not be questioned in a municipal Court. Dealing with this aspect of the case Lord Atkin L. J. observed as follows (p. 671):

"A suggestion was made by one of the learned judges that the order in this case was an act of state. This phrase is capable of being misunderstood. As applied to an act of the sovereign power directed against another sovereign power or the subjects of another sovereign power not owing temporary allegiance, in pursuance of sovereign rights of waging war or maintaining peace on the high seas or abroad, it may give rise to no legal remedy. But as applied to acts of the executive directed to subjects within the territorial jurisdiction it has no special meaning, and can give no immunity from the jurisdiction of the Court to inquire into the legality of the act."

A review of these authorities makes it plain that the acts of the Provincial Government which are purported to be done under the provisions of any municipal law are liable to be questioned in municipal Courts. In the present case the act of requisition is such an act and is therefore liable to be questioned in Court.

[45] I next turn to the second branch of the argument, viz., that this Court never had jurisdiction to issue writs against the Provincial Government. By the Indian Independence Act, 1947, two independent dominions were set up in India as from 15th August 1947, viz., India and Pakistan. Section 223, Government of India Act, 1935, which deals with the jurisdiction of the High Courts was amended so as to provide *inter alia* that the jurisdiction of any existing High Court "shall be the same as immediately before the establishment of the Dominion." That jurisdiction was to be found in s. 223 as it stood before the amendment, which provides that the jurisdiction "shall be the same as immediately before the commencement of Part III of this Act." Part III was brought into force from 1st April 1937, by the Government of India (Commencement etc.) Order, 1936. Jurisdiction before that date was to be found in s. 106 (1), Government of India Act, 1915, which *inter alia* provides that the High Courts shall have "all such jurisdiction, powers and authority as are vested in these Courts respectively at the commencement of this Act." Those were to be found in s. 9, High Courts Act, 1861 (24 & 25 Vic. c. 104). That section provided that the High Court shall have such jurisdiction as Her Majesty may by a Letters Patent grant and subject to these and to the legislative powers of the Governor-General of India in Council

"the High Court to be established in each presidency shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts in the same presidency abolished under this Act at the time of the abolition of such last mentioned Courts."

The Courts abolished were of course the Supreme Courts. The Letters Patent of 1862 constituting the Bombay High Court, which was revoked by the Letters Patent of 1865, left the jurisdiction of the High Court which it inherited from the Supreme Court unaltered. The Supreme Court was established under the Letters Patent of 1823, which itself was issued under the authority conferred by 4 Geo. IV c. 71. Clause VII of the said Act says that it shall be lawful for His Majesty to establish a Supreme Court at Bombay

"to be invested with such Powers and Authorities, Privileges and Immunities, for the better Administration of the same, and subject to the same Limitations, Restrictions and Control, within the said Town and Island of Bombay, and the Limits thereof, and the Territories subordinate thereto, and within the Territories which now are or hereafter may be subject to or dependent upon the said Government of Bombay, as the said Supreme Court of Judicature at Fort William in Bengal, by virtue of any law now in force and unrepealed doth consist of, is invested with, or subject to, within the said Fort William, or the places subject to or dependent on the Government thereon."

Under cl. v, Letters Patent the Supreme Court was

"to have such jurisdiction and authority as our justices of our Courts of King's Bench have and may lawfully exercise within that part of Great Britain called England as far as circumstances will admit."

Tapping in his Law and Practice of High Prerogative Writs and Mandamus at p. 122 states that the writ lay against the Board of Directors of the East India Company and this is supported by two cases there relied upon, viz. *The King v. Directors of East India Co.* (1833) 4 B. & Ad. 530 and *The King v. Directors of East India Co.* (1815) 4 M. & S. 279. After the governance of India was taken over from the Company by the Crown in 1858 by 21 & 22 Vic. c. 106, s. 65 of the Act provided that the Secretary of State for India can sue and be sued in respect of debts, liabilities, etc. for which the East India Company could have been sued. The word "sued" in this context means, as I shall point out later, "be proceeded against according to law." This liability of the Secretary of State to sue or be sued was subsequently embodied in s. 32, Government of India Act, 1915, and sub-ss. (1) and (2) thereof are as follows:

"32. (1) The Secretary of State in Council may sue and be sued by the name of the Secretary of State in Council as a body corporate.

(2) Every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company if the

Government of India Act, 1858, and this Act had not been passed."

The Provincial Government is only a successor to the Secretary of State in Council in the provincial sphere and therefore the Court had and has jurisdiction to issue writs against it unless immunity has been legally conferred upon it.

[46] That brings me to the last branch of the argument which rests upon the immunity from legal process conferred upon the Governor by S. 306 (1), Government of India Act, 1935. The relevant part of that section is :

"No proceedings whatsoever shall lie in, and no process whatsoever shall issue from, any Court in India against the Governor-General, or against the Governor of a Province, whether in a personal capacity or otherwise."

The question for decision is what is the true meaning of the words "in a personal capacity or otherwise." To my mind "personal capacity" means private capacity as an individual, and "otherwise" means public capacity but again as an individual. That the immunity is conferred on the individual is borne out by the later part of this sub-section which I have not set out above, which confers immunity on persons who have been Governors etc. in the past. No proceedings will lie against them except with the sanction of the Governor General.

[47] The contention of the Advocate-General is that the Governor is the Provincial Government or, at any rate, the Governor is included in the Provincial Government; and, therefore, the protection given by this sub-section extends to the Provincial Government. It is true that under S. 49, Government of India Act, the executive authority of the Province is exercised on behalf of His Majesty by the Governor; but it is a mistake to suppose that he alone constitutes the "Provincial Government." Section 20 requires that there shall be a council of ministers, the requirement being obligatory, to aid and advise the Governor in the exercise of his functions. The provisions contained in that section relating to the Governor's power to act in his discretion or in his individual judgment were deleted with effect from the date on which the Indian Independence Act came into force, with the result that the Governor has now to act on the advice of his ministers, the real power resting with the ministers and not with the Governor. The Provincial Government, therefore, is the Governor acting on the advice of his ministers. It is the Governor as an individual, whether in his private capacity or his public capacity, who is protected under S. 306 (1) and not the Provincial Government.

[48] Strong support to this interpretation of S. 306 (1) is to be found in the language employed in the proviso to the section. That proviso is:

"Provided that nothing in this section shall be construed as restricting the right of any person to bring against the Dominion, or a Province, such proceedings as are mentioned in Chap. III of Part VII of this Act." Ordinarily the function of a proviso is to save something from the operation of the substantive section. If proceedings against the Dominion or a Province were covered by the section, the proviso would have stated that nothing in the section "shall restrict" the right of any person to bring proceedings against the Dominion or a Province etc., and not "shall be construed as restricting." The choice of the latter phraseology by the Legislature indicates that the Legislature did not consider that the Dominion or the Provinces were included in the immunity conferred by the sub-section; but it provided against the possibility of such a construction being put upon the sub-section by any one. In other words, the proviso does not serve the normal purpose which a proviso is intended to serve, but it is inserted *ex majori cautela*.

[49] A subsidiary contention of the Advocate-General has been that the act of requisition under S. 3 of the Ordinance is the act of the Governor, for the words "Provincial Government" in that section mean the Provincial Governor by virtue of cl. (a) of sub-s. (43a), (of S. 3?) General Clauses Act, 1897, as amended by the India (Adaptation of Indian Laws) Order, 1947. This argument cannot help the Advocate-General, because if the immunity is to the Governor in his individual capacity private or public, it cannot extend to the acts of the Provincial Government.

[50] Assuming, however, that the construction I have put upon S. 306 (1) is erroneous and that the Dominion and the Province is included in the protection given by that sub-section, the next question to consider is whether a writ of *certiorari* falls within the proviso which would then be a real proviso in respect of the immunity conferred by sub-s. (1). The proviso preserves the right to bring against the Dominion or the Province such proceedings as are mentioned in Chap. 3 of Part. VII. That Chapter is headed "Property, Contracts, Liabilities and Suits" and the relevant section is S. 176, sub-s. (1), which is as follows :

"The Dominion may sue or be sued by the name of the Dominion of India and a Provincial Government may sue or be sued by the name of the Province, and, without prejudice to the subsequent provisions of this chapter, may, subject to any provisions which may be made by Act of the Dominion Legislature or a Provincial Legislature enacted by virtue of powers conferred on the Legislature by this Act, sue or be sued in relation to their respective affairs in the like cases as the Secretary of State in Council might have sued or been sued if this Act had not been passed."

I read the section as being in two parts. The first part provides for the names in which the Dominion

and the Provincial Governments may sue or be sued and constitutes the Dominion of India and the Provinces juristic persons for that purpose. The latter part provides the extent to which they can sue or be sued and that is the same extent to which the Secretary of State in Council might have sued or been sued prior to the Act.

[51] The first contention of the Advocate-General with regard to this section is that the word "sue" must be restricted to suits instituted by filing plaints, and does not include any other legal process. That argument to my mind is untenable. Wharton in his Law Lexicon gives the meaning of "sue" to be "prosecute by law; to claim a civil right by means of legal procedure." In *Vejeram v. Purshottumdas*, 7 Bom. L. R. 138, Tyabji J., interpreted the word "sue" appearing in S. 43, Civil P. C. The learned Judge stated (p. 141) :

"Now the dictionaries tell us that to sue means to make a legal claim or to take legal proceedings against any person. It does not necessarily mean to file a suit by means of a plaint such as is referred to in the Civil Procedure Code. Taking any legal proceedings in matters of any kind would be to sue."

I have, therefore, no hesitation in holding that the word "sue" in S. 176 has the same wide meaning and includes a petition for writs.

[52] The second argument of the Advocate-General is that in any event no writs lay against the Secretary of State in Council. As I have pointed out earlier while dealing with the argument on the jurisdiction of this Court to issue such writ, the Court had such jurisdiction unless immunity from jurisdiction was to be found in some enactment. It would be useful to trace the history of immunity from process of Court in India. In 1781 as a result of dissensions between the Judges of the Supreme Court and the Governor-General and the Council of Bengal, the East India Company Act (21 Geo. III, c. 70) was passed. Section 1 enacted that the Governor-General and the Council of Bengal shall not be subject to the jurisdiction of the Supreme Court "for or by reason of any act or order or any other matter or thing whatsoever counselled, ordered, or done by them in their public capacity only acting as Governor-General and Council."

Section 2 conferred similar immunity on all persons for acts done by order of the Governor. Section 3 contained a proviso which is in these terms :

"Provided always, that with respect to such order or orders of the said Governor General and council as do or shall extend to any British subject or subjects, the said Court shall have and retain as full and competent jurisdiction as if this Act had never been made."

Section 4 provides that despite such immunity proceedings would lie in the King's Bench Division of England. The Charter Act of 1823, 4 Geo. IV, c. 71, S. 7, which authorised the esta-

blishment of the Supreme Court at Bombay by a Letters Patent contained the following proviso:

"Provided always, that the Governor and Council at Bombay, and the Governor-General at Fort William aforesaid, shall enjoy the same exemption and no other, from the authority of the said Supreme Court of Judicature to be there erected, as is enjoyed by the said Governor-General and Council at Fort William aforesaid for the time being, from the jurisdiction of the Supreme Court of Judicature there already by law established."

The Letters Patent of 1823 conferred upon the Governor freedom from arrest and imprisonment and also enacted that the Governor and any of the Council shall not be subject to the jurisdiction of the Court, but the proviso contained in S. 3 of the Act of 1781 was not repeated. However, since the Letters Patent was issued under the authority of the Charter Act of 1823 which clearly provided that the Governor and Council shall enjoy "the same exemption and no other" as enjoyed by the Governor-General and Council of Bengal from the jurisdiction of the Supreme Court of Bengal the proviso contained in S. 3 of the Act of 1781 continued to have full force. This immunity was preserved throughout the Government of India Acts and was found in S. 110 of the Act of 1915, prior to the Act of 1935.

[53] It is not necessary to consider precisely the extent of this immunity, for, in my opinion, the immunity was conferred throughout on the Governor-General and Council and not on the East India Company, who was subject to the jurisdiction of the Courts up to 1858. After 1858 although the immunity continued, the Secretary of State could sue and be sued in place and stead of the East India Company. There is to my mind no warrant for the proposition that the Secretary of State was immune from the jurisdiction of the High Court to issue writs. This contention of the Advocate-General must also therefore fail.

[54] The Advocate-General has strongly relied on certain decisions of the Madras High Court and a decision of the Calcutta High Court in which it has been held that a writ of *certiorari* does not lie against a province. The respect in which we hold our sister High Courts had led me carefully to consider those judgments and I will proceed to state shortly my reasons for coming to a contrary conclusion.

[55] The case of *Venkataratnam v. Secretary of State for India*, 53 Mad. 979 : (A. I. R. (17) 1930 Mad. 896) was decided under the Government of India Act, 1915. This was a petition for the issue of a writ of *certiorari* to the Honourable the Minister of Public Health. (See judgment of Madhavan Nair J. at p. 1001). It was held that no writ lay. Venkatasubba Rao J. based his judgment on two grounds: (1) that

under S. 106 (1), Government of India Act, 1915, there was no jurisdiction to issue a writ against the Governor of Madras and equally none against the Governor acting with the Ministers, and (2) that the exemption contained in S. 110, Government of India Act, 1915, applied to the Governor acting with the Ministers. Now S. 110 in terms included the Ministers within the scope of the immunity, and if I may say so with respect, the decision was no doubt right on that ground alone. But the learned Judge at p. 996 after referring to the provisions of the Statute of 1780 observed as follows :

"The Governor is thus individually not amenable for acts done in his official capacity. As granting the writ against 'the Governor acting with Ministers' involves the exercise of jurisdiction against the Governor himself it follows that we must even as against that body, refuse to issue *certiorari*."

While the former proposition is unexceptional, with respect, I am unable to agree with the latter. The learned Judge himself in a later passage in the judgment states (p. 1000) :

"Reading the section strictly, the Governor is exempted, so are the Members and the Ministers. But this exemption does not extend to 'the Governor in Council' or the 'Governor acting with Ministers.'"

With that statement I am in entire agreement, but I respectfully disagree when the learned Judge proceeds to observe (p. 1000) :

"We must construe the section reasonably. If each of these individuals enjoy immunity in respect of his public acts, it stands to reason that they should likewise be exempt when acting jointly."

In my opinion, a statute ousting the jurisdiction of the Superior Courts must be strictly construed. I may further point out that there was no proviso to S. 110 of the Act of 1915 corresponding to the proviso to S. 306 (1) of the Act of 1935.

[56] We next have the case of *Thyagarajan v. Government of Madras*, I. L. R. (1940) Mad. 204 : (A. I. R. (26) 1939 Mad. 940). It was decided under the Government of India Act, 1935. Here the petition was for a writ of *certiorari* against the Provincial Government and on that ground the case of *Venkataratnam v. Secretary of State for India*, 53 Mad. 979 : (A. I. R. (17) 1930 Mad. 896), was sought to be distinguished in argument. At page 207 Leach C. J. held that no writ lay. He stated that : "The position under the Government of India Act, 1935, is not here different from the position under the Government of India Act, 1915...." With respect this ignores altogether the proviso to S. 306 (1) which was not considered at all in this case. The learned Chief Justice then proceeded to observe (p. 209) :

"Section 59 requires all executive action of the Government of a Province to be taken in the name of the Governor and the order in question being an executive order lawfully passed and lawfully issued in the name of the Governor and therefore his order, the Court has no power to interfere with it."

With these observations again I must express my respectful disagreement. Section 59 to my mind merely provides that all executive acts "shall be expressed to be taken in the name of the Governor." It does not make them the acts of the Governor.

[57] The latest decision of the Madras High Court is that of *Kandaswami v. Province of Madras*, I. L. R. (1948) Mad. 283 : (A. I. R. (34) 1947 Mad. 443) in which the same view was taken as in the case last cited. It appears from the judgment of the learned Chief Justice at p. 292 that it was not even suggested in argument that the proviso to S. 306 (1) had to be considered before deciding the matter.

[58] There is a decision of the Calcutta High Court in *In re Banwarilal Roy*, 48 C. W. N. 766, in which that High Court took the same view as the Madras High Court. Das J. delivered an exhaustive and learned judgment in the course of which after dealing with the history of the jurisdiction of the High Court at p. 803 he observed as follows :

"This takes us further back to the Regulating Act, the Charter of 1774 and the Act of Settlement, under which only such suit or action could be brought against the United Company as were mentioned in cl. 13 of that Charter. There is no suggestion that except in such suit or action the Supreme Court had any other jurisdiction, powers or authority over the Company as such or could issue any prerogative writ against the Company as such."

With respect to the learned Judge, he appears to have overlooked cl. 5 of the Charter which conferred upon the Supreme Court the same jurisdiction as "our justices of our Courts of King's Bench have and may lawfully exercise" in England. This led the learned Judge to hold that S. 176 (1), Government of India Act, 1935, does not apply to writs, an opinion with which I must express my respectful dissent. Dealing with S. 306 (1), Government of India Act, 1935, the learned Judge stated on the same page :

"To accede to this application for issue of a writ of *Certiorari* against the Government of Bengal will inevitably mean issuing process against the Governor, for he is at least a part of the Government of Bengal. It is illogical to hold that although this Court has no jurisdiction whatever over the Governor by himself, this Court has jurisdiction over him when he is associated with his Ministers."

In expressing this opinion the learned Judge quoted with approval the decision in *Venkataratnam v. Secretary of State for India*, 53 Mad. 979 : A. I. R. (17) 1930 Mad. 896. For reasons already set out I am unable to share this view, as I am firmly of the opinion that any provision ousting the jurisdiction of Superior Courts must be strictly construed.

[59] Lastly, there is a judgment of my learned brother Coyajee J. in *Lady Dinbai Petit v. Noronha*, 47 Bom. L. R. 500 : (A. I. R. (32) 1945

Bom. 419). The learned Judge there followed the decisions of the Madras and Calcutta High Courts and it appears from the report that no arguments were placed before the learned Judge regarding the proviso to S. 306 (1), Government of India Act, 1935. The case went to the Appeal Court and is reported in *Lady Dinbai Petit v. M. S. Noronha*, 48 Bom. L. R. 255 : (A. I. R. (33) 1946 Bom. 407). A Division Bench consisting of Kania and Chagla JJ. (as they then were) held that the Province was not a party to the proceedings and the question as to whether a writ lies against a Province did not arise for determination: but both the learned Judges stated that they should not be understood to be in agreement with the reasoning of the learned trial Judge on the interpretation of S. 306 (1). (See pages 264 and 270 of the report).

[60] I have, therefore, come to the conclusion that a writ of *certiorari* lies against a Province and I agree with the order proposed by my Lord the Chief Justice for the disposal of this appeal.

R.G.D.

Order accordingly.

A. I. R. (36) 1949 Bombay 303. [C. N. 78.]

CHAGLA C. J. AND TENDOLKAR J.

P. V. Rao and another—Appellants v. Gir-dharlal Lallubhai—Respondent.

Appeal No. 69 of 1948, Decided on 4th January 1949, from judgment of Bhagwati J., D/- 27th September 1948.

(a) Bombay Land Requisition Ordinance (V [5] of 1947), S. 4 (4) — Government cannot requisition new premises which are under construction at time of order.

Where the Government requisitions under S. 4 (4), new premises which are still under construction, the Government acts in excess of their jurisdiction. Such premises cannot be described as "vacant" on the date of the notification or premises which "become vacant" after the notification, within the meaning of S. 4. The expressions do not apply to premises coming into existence after the notification. [Para 1]

(b) Bombay Land Requisition Ordinance (V [5] of 1947), S. 4 — Requisition of premises under S. 4 (4) is conditional upon premises being vacant—Government has to determine whether facts constitute vacancy — Order therefore is quasi-judicial order — Writ of *certiorari* can be issued in case Government exceeds jurisdiction — Writ lies only against Province of Bombay and not against Assistant Secretary to Government or Minister — Order under S. 45, Specific Relief Act, cannot be issued either against Province or against Secretary to Government or Minister—*Certiorari*—Specific Relief Act (1877), S. 45.

Jurisdiction to requisition premises under S. 4 (4) is conditional upon the premises being vacant as provided by sub-s. (1). Under sub-s. (4) as under S. 3 an objective fact has got to be determined before an order of requisition can be made, and that objective fact is whether the premises are vacant or become vacant. The Legislature has imposed upon the Government the duty to de-

termine various facts and circumstances which go to constitute a vacancy as understood and defined by S. 4 of the Ordinance. Therefore, an order of requisition made by Government under S. 4 (3) is a quasi-judicial order, and if Government act in excess of their jurisdiction a writ of *certiorari* can be directed to be issued against them. [Paras 1 and 2]

But the writ would be only against the Province of Bombay and not against the Assistant Secretary of the Government of Bombay or the Minister. [Para 2]

No order under S. 45, Specific Relief Act also can be made against the Assistant Secretary and the Minister. And as regards Province of Bombay, S. 45 itself precludes such an order being made against it: A. I. R. (36) 1949 Bom. 277, *Rel. on.* [Para 3]

M. P. Amin, Acting Advocate General and G. N. Joshi—for Appellants.

N. A. Palkhiwalla—for Respondent.

Facts. — The petitioner started adding new rooms to his building. He agreed to let 2 of the rooms viz., Nos. 11 & 12 on 13th November 1947 to one B from the time the rooms were ready for occupation. On 18th March 1948, while the rooms were still under construction the Government of Bombay issued the orders requisitioning the rooms and they were found pasted on the doors of rooms Nos. 11 and 12. The orders were issued in the exercise of powers under S. 4 (4), Bombay Land Requisition Ordinance (v [5] of 1947) by the order of the Governor by the Assistant Secretary, Bombay Government, Health and Local Government Department. In pursuance of one of the orders the Inspector in Health and Local Government Department took possession of the rooms which were still under construction. On 5th April 1948, the petitioner filed a petition in the High Court praying for (1) a writ of *certiorari*, (2) writ of prohibition, (3) an order under S. 45, Specific Relief Act, (4) interim relief in terms of prayer (3) and (5) *ad interim* relief in terms of prayer (3). Originally the petition was filed against the Assistant Secretary, Government of Bombay and one R to whom the rooms were allotted by the Government but subsequently the petition was amended by addition of the Province of Bombay and the Minister in charge of the department. Bhagwati J. before whom the petition came on 27th September 1948 made an order in terms of prayers (1), (2) and (3). The respondents appealed.

Chagla C. J.—This is also an appeal against the judgment of Mr. Bhagwati J. ordering the issue of a writ of *certiorari* against the three respondents. The same questions are involved in this appeal as were involved in *Rao v. Advani*, 51 Bom. L. R. 342 : (A. I. R. (36) 1949 Bom. 277) and for the reasons given by us in that appeal the same consequences must follow in this appeal. But the order made by Government which is challenged is under S. 4 (3) of the Ordinance and not under S. 3. It

is not disputed that the premises which were requisitioned were not in existence at the date when the Notification was issued by the Provincial Government specifying the areas in which premises are situated to which S. 4 would apply and the question that arises for determination is whether S. 4 would apply to premises which come into existence after the date of the Notification. Now, S. 4 refers to premises which are vacant on the date of such Notification or which become vacant after such date. They were certainly not vacant at the date of the Notification. Can it be said that they became vacant after the date of the Notification? In my opinion, "become vacant" only applies to such premises as were in existence at the date of the Notification and not to premises which come into existence after the date of the Notification. This is clear from the language of S. 4 (1) itself because it refers not to any premises but such premises, premises as are referred to in the earlier part of that subsection. Therefore, in requisitioning premises under sub-s. (4), the Government were acting in excess of their jurisdiction. Their jurisdiction to requisition premises under sub-s. (4) is conditional upon the premises being vacant as provided by S. 4 (1). This is also clear from the language of sub-s. (4) because the power to requisition is not with regard to any premises but *the* premises, and the premises can only be the premises referred to in S. 4 (1).

[2] Under sub-s. (4) also as under S. 3, an objective fact has got to be determined before an order of requisition can be made, and that objective fact is whether the premises are vacant or become vacant. The fact of premises being vacant or becoming vacant is not something which is capable of ascertainment by mere physical demonstration, because S. 4 defines what is the meaning of the expression "vacant", and the premises are only vacant or become vacant (1) by the landlord ceasing to occupy the premises, (2) by the termination of a tenancy, (3) by the eviction of a tenant, (4) by the release of the premises from requisition, and (5) otherwise. It is unnecessary to consider whether "otherwise" is *ejusdem generis* with what goes before or not. But the fact remains that the Legislature has imposed upon the Government the duty to determine various facts and circumstances which go to constitute a vacancy as understood and defined by S. 4 of the Ordinance. Therefore, in my opinion, just as in the case of S. 3, an order of requisition made by Government under S. 4 (3) is a quasi-judicial order, and Government having acted in excess of their jurisdiction a writ of *certiorari* has been rightly directed to be issued against them. For the same

reasons given by us in *Rao v. Advani*, 51 Bom. L. R. 342 : (A. I. R. (36) 1949 Bom. 277) the writ would not lie against respondents 1 and 4.

[3] The learned Judge has also made an order apparently under S. 45, Specific Relief Act against respondents 1, 3 and 4, ordering them to hand over to the petitioner possession of the requisitioned premises. For reasons I have already given in *Rao v. Advani*, 51 Bom. L. R. 342 : (A. I. R. (36) 1949 Bom. 277) no order under S. 45 can be made against Mr. Rao and Mr. Vartak. With regard to the Province of Bombay S. 45 itself in terms precludes such an order being made against the Provincial Government. The result, therefore, is that the appeal will be allowed as against appellants 1 and 3 and with regard to the order made against appellant 2 the order will be maintained to the extent that a writ of *certiorari* has been directed against it, but the order will be modified by deleting from it the direction as to handing over possession.

[4] The result, therefore, is that the appeal will be allowed as against appellants 1 and 3 and the appeal will be dismissed as against appellant 2.

[5] As regards the costs of the petition, the costs will be paid by the Province of Bombay and not by all the respondents, as directed by the learned trial Judge. As far as the costs of the appeal are concerned the respondents have substantially succeeded and therefore the appellant must pay the costs of the appeal. Costs will be taxed on the basis of a long cause scale, with two counsel certified. Certificate under S. 205, Government of India Act to issue.

[6] **Tendolkar J.**— I agree. I wish only to add that I have come to the conclusion that an act of requisition under S. 4 of the Ordinance is a quasi-judicial act, because this section imports the legal concept of vacancy as distinguished from the mere physical concept in the sense of non-occupation. Whether or not premises are so vacant is therefore a matter to be determined and the existence of a vacancy is a condition precedent to the exercise of the power of requisitioning. The case therefore falls within the ratio that I have attempted to lay down in my judgment in *Rao v. Advani*, 51 Bom. L. R. 342 : (A. I. R. (36) 1949 Bom. 277).

R.G.D.

Appeal partly allowed.

A. I. R. (36) 1949 Bombay 304 [C. N. 79.]

DESAI J.

Juharimal Senaji — Plaintiff v. Liladhar Madhavji Satwara — Defendant.

O. C. J. Suit No. 1158 of 1947, Decided on 22nd July 1948.

(a) Bombay Agricultural Debtors Relief Act (XXVIII [28] of 1947), Ss. 1 (2), 2 (3) and 19—Provisions of Act not applicable to Courts in City of Bombay — Bombay Court not bound to transfer suit.

The provisions of the Bombay Agricultural Debtors Relief Act, 1947, do not apply to the City of Bombay and the Courts in the City of Bombay are not bound to transfer the suit to the Court within the meaning of the Act. [Para 9]

(b) Bombay Agricultural Debtors Relief Act (XXVIII [28] of 1947), Ss. 2(3) and 19 — Party desiring to have suit transferred to Court within meaning of Act to mention Court within whose jurisdiction he was ordinarily residing—Civil P. C. (1908), S. 20.

The definition of the 'Court' in S. 2 (3), refers to ordinary residence. A man may be residing at more than one place. But ordinary residence is not the same thing as residence. If a party wants to have a suit transferred to the Court within the meaning of the Act he should mention the Court within whose jurisdiction he was ordinarily residing in his pleading as that is a question of fact and not of law: 3 All. 91 (P. C.), *Rel. on.* [Para 13]

Annotation : ('44-Com.) C. P. C., S. 20 N 5 Pt. 1.

N. A. Mody — for Plaintiff.

S. A. Desai — for Defendant.

Judgment.—The plaintiff has filed this suit against the defendant to recover three sums, one of Rs. 4,500 lent by the plaintiff to the defendant on 30th June 1946, another of Rs. 400 lent by the plaintiff on 2nd December 1946, and a third sum of Rs. 50 lent by the plaintiff on 30th January 1947. The plaintiff in addition to these three sums, claims interest, with the result that the total amount now claimed by him is Rs. 5,952 and interest. In para. 7 of the plaint the plaintiff says that the defendant resides in Bombay. It is not stated that the defendant ordinarily resides in Bombay.

[2] By his written statement the defendant has raised various defences, the first of which is contained in para. 1 of his written statement. That paragraph states as follows :

"The defendant holds land for agricultural purposes in the Thana District and has been cultivating land personally; his annual income from sources other than agricultural and manual labour does not exceed 33 per cent. of his total annual income and his total debts are below Rs. 15,000. The defendant therefore submits that he is a debtor within the meaning of the Bombay Agricultural Debtors' Relief Act, 1947, and this Honourable Court has no jurisdiction to try this suit."

[3] In para. 2 the defendant claims the benefit of being an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, 1879, and submits that for that reason also this Court has no jurisdiction to try the suit. By para 10 the defendant says that the plaintiff is entitled if at all to recover from the defendant only a sum of Rs. 3,400 with interest thereon at 6 per cent. per annum.

[4] The statement made in para. 7 of the plaint that the defendant resides in Bombay is not denied. The written statement does not men-

tion the area wherein the defendant ordinarily resides or the Court of the Civil Judge having ordinary jurisdiction in that area.

[5] On these pleadings the following issues were raised :

1. Whether the defendant is a debtor within the meaning of the Bombay Agricultural Debtors' Relief Act, 1939, or 1947 ?

2. Whether the defendant is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, 1879 ?

3. If either of the first two issues is answered in the affirmative, whether this Honourable Court has jurisdiction to try the suit?

The last issue is :

4. What is the amount due and payable to the plaintiff by the defendant ?

[6] As far as these issues are concerned, I must point out that the issue that the defendant is a debtor within the meaning of the Bombay Agricultural Debtors' Relief Act, 1947, does not arise on the written statement. In my opinion, that defence should in terms have been raised. No application for amendment of the written statement was made. It is not a question of law only but a question of fact and law. The issues in this case were handed in after the arguments as regards the Act of 1947 commenced. The issue on the Act of 1939 was raised by Mr. S. A. Desai as a result of the argument which Mr. N. A. Mody advanced after Mr. Desai had finished his opening address on the Act of 1947. In my opinion he is not entitled to raise the defence based on the Act of 1939.

[7] I shall now consider the provisions of the Bombay Agricultural Debtors' Relief Act, 1947, as I have to decide whether as a result of that Act this Court has no jurisdiction to try this suit. Mr. S. A. Desai has drawn my attention to the preamble to the Act which says as follows :

"WHEREAS it is expedient to consolidate and amend the law for the relief of agricultural debtors in the Province of Bombay and for certain other purposes specified therein : It is hereby enacted as follows:"

Section 1 reads as follows :

"This Act may be called the Bombay Agricultural Debtors' Relief Act, 1947.

It extends to the whole of the Province of Bombay except the City of Bombay."

[8] The whole argument centres round those important words "except the City of Bombay." Mr. Desai has contended that the object of the Act was to give relief to agricultural debtors in the Province of Bombay, but that so far as agricultural debtors in the City of Bombay holding lands in Bombay were concerned, the intention of the Legislature was not to give them the relief which was meant for other agricultural debtors in the Province of Bombay. Mr. Desai says that if a man owned land in Bombay only and resided in Bombay, the benefit of the Act was not intended to be given to him. If a man owned land in Bombay but was not resident in

Bombay and also held land outside Bombay. Mr. Desai contended that the Bombay land would be taken into consideration along with the other lands outside Bombay for the purposes of the Act of 1947. Mr. Desai has drawn my attention to S. 2, sub-s. (3), which defines the word "Court" used in the Act and to the word "debtor" which is defined in S. 2, sub-s. (5). Mr. Desai has also drawn my attention to S. 15 of the Act and to S. 19. Under S. 19, sub-s. (1), all suits . . . in respect of any debt pending in any civil or revenue Court shall, if they involve the questions whether the person from whom such debt is due is a *debtor* and whether the total amount of debts due from him on the date of the application exceeds Rs. 15,000, be transferred to the "Court." Mr. Desai argues that the words "Civil (or revenue) Court" include the High Court of Bombay, and that the present suit should be transferred to the "Court" within the meaning of the Act as the defendant is not residing in Bombay. Mr. Mody on the other hand argues that on a plain reading of S. 1 the Court in the City of Bombay is expressly excluded from the operation of the Act. He says that the word "it" in sub-s. (2) of S. 1 which talks of "It extends to the whole of the Province of Bombay except the City of Bombay" includes all sections contained in the Act, and, therefore, he reads S. 1, sub-s. (2), in reference to S. 19 as follows. "The provisions of S. 19 extend to the whole of the Province of Bombay except the City of Bombay." I am inclined to accept that view. In other words S. 19 read with S. 1, sub-s. (2), must be held to read as follows: "All suits pending in any Civil Court in the Province of Bombay, except in the City of Bombay (meaning except in Courts in the City of Bombay) shall be transferred to the 'Court' within the meaning of the Act of 1947." If it was intended to take away the jurisdiction of the High Court of Bombay, the Legislature should have used the necessary words for that purpose. Not only are there no words taking away the jurisdiction of the High Court of Bombay, but, on the contrary, my reading of S. 1, sub-s. (2), is that that jurisdiction is expressly preserved. Mr. Desai has rightly appealed to me that this can scarcely be in consonance with the spirit of this legislation. I have, however, to deal with the plain language of the Act and not with the policy underlying it which led to the enactment of the several provisions therein contained. Mr. Mody has drawn my attention to Bombay Act XXVIII [28] of 1939 called the Bombay Agricultural Debtors Relief Act, 1939, and the provisions of S. 37 thereof which correspond to the provisions contained in S. 19 of the Act of 1947. Mr. Mody points out that under S. 2 of the Act of 1939 the provisions of S. 37 have been

expressly stated to extend to the whole of the Province of Bombay. He, therefore, concedes that under S. 37 of the Act of 1939 the High Court of Bombay was bound to transfer the suits to the Board mentioned in S. 37. Mr. Mody has also referred me to the provisions of the Dekkhan Agriculturists' Relief Act of 1879. He says that by S. 1 of that Act, S. 11 has been extended to the whole of British India. By S. 11 of that Act it is provided that every suit of the description mentioned in S. 3, cl. (w), may, if the defendant, or, when there are several defendants, one only of such defendants is an agriculturist, be instituted and tried in a Court within the local limits of whose jurisdiction such defendant resides, and not elsewhere. Mr. Mody says there are no such express words taking away the jurisdiction of the Bombay High Court under the Act of 1947. When faced with this difficulty, Mr. S. A. Desai tried to argue that the Act that he was thinking of was not the Act of 1947 but the Act of 1939. He said that this suit was filed on 28th April 1947, and the present Act came into force in May 1947, and, therefore, the Act which was in force on the date of the suit was the Act of 1939 and the provisions of that Act must be held to apply to this suit now that the question has come up before me for consideration whether this Court should transfer the suit. Mr. Mody points out that if that be so, the defendant is faced with this further difficulty that there are no Boards to-day in existence within the meaning of the Act of 1939 to whom this suit can be referred as provided by S. 37 of that Act, those Boards having been abolished by the Act of 1947 — see S. 56 of the Act of 1947. I accept Mr. Mody's argument in this behalf. Even if it was permissible for Mr. Desai to argue that the Act of 1939 applies, which I think is not permissible, the Act of 1939 is inapplicable since there are no Boards to which this suit can be transferred, and the jurisdiction of the High Court remains unaffected in that behalf.

[9] Mr. Mody has contended that under the Act of 1947 it is not the location of the land but the residence of the owner of the land which is a matter of moment, and, therefore, he says that it is wrong to allege that the words "City of Bombay" in S. 1 refer to the land in the City of Bombay, as Mr. Desai seemed to suggest. He says that the words "except in the City of Bombay" mean except to Courts in the City of Bombay, and he goes further and says that the Act does not apply to persons ordinarily resident in Bombay or to land in Bombay. In my opinion, the provisions of the Act of 1947 do not apply to the City of Bombay and that Courts in the City of Bombay are not bound to transfer the suit to the "Court" within the meaning of the Act of 1947. As regards the Act of 1939, there

being no Board to which the transfer can be made under the provisions of that Act, the jurisdiction of the High Court of Bombay to try this suit remains unaffected.

[10] The whole of the above discussion as regards the Act of 1947 arises out of the defendant's submission in para. 1 of the written statement that he is a debtor within the meaning of the Bombay Agricultural Debtors' Relief Act of 1947 and this Court has no jurisdiction to try this suit. The Act of 1939 is not referred to in para. 1 of the written statement, and I have already expressed my opinion that the defendant is not entitled to rely on that Act, as that defence raises not only a question of law but also a question of fact. When faced with this difficulty, Mr. Desai referred me to the judgment of the Appeal Court in this suit (Appeal No. 67 of 1947, decided by Chagla C. J. and Tendolkar J., on 3rd March 1948). That appeal arose out of a refusal by Coyajee J. to give leave to the defendant to defend the suit when it came on for hearing before him on a summons for judgment and when he passed a decree on admissions against the defendant. The defendant preferred an appeal, and the appeal was allowed. In the course of his judgment, Chagla C. J. said:

"No further pleadings are necessary because the affidavit of the defendant may be treated as the written statement where the point has been clearly raised."

Though the defendant had the right to have his affidavit treated as his written statement, he has chosen to put in a written statement, and I am therefore not inclined to refer to the affidavit of the defendant dated 25th August 1947. Mr. Desai said that in para. 3 of that affidavit the defendant has not referred to the year of the Act and has only referred in general terms to the Bombay Agricultural Debtors' Relief Act and that he is therefore entitled to rely on the Act of 1939. I do not think so, as the defendant by his written statement has expressly chosen to rely on the Act of 1947. If as Mr. Desai says now the Act of 1947 does not apply, then there is no defence on the Bombay Agricultural Debtors' Relief Act raised which I have to try.

[11] There is one further point which I would like to draw attention and which does not seem to have been appreciated by counsel in the case who argued the matter before me. The Act of 1947 defines "debtor" as follows:

" 'Debtor' means—

(a) an individual—

(i) who is indebted;

(ii) who holds land used for agricultural purposes or has held such land at any time not more than 30 years before the 30th January 1940, which has been transferred whether under an instrument or not and which transfer is in the nature of a mortgage although not purporting to be so;

(iii) who has been cultivating land personally for the cultivating seasons in the two years immediately preceding the date of the coming into operation of this Act or of the establishment of the Board concerned under the repealed Act; and

(iv) whose annual income from sources other than agriculture and manual labour does not exceed 33 per cent. of his total annual income or does not exceed Rs. 500, whichever is greater."

This means that the individual referred to in S. 2, sub-s. (5) (a), is a person who complies with all the requirements of sub-cl. (i) to (iv) of sub-cl. (a) and particularly in this case of S. 2, sub-S. (5) (a) (iii). The averments made in para. 1 of the written statement are not sufficient to constitute the defendant a "debtor" within the meaning of S. 2, sub-s. (5) (a) (iii). The defendant's submission that he is a debtor, because of the facts alleged in para. 1 of the written statement, within the meaning of the Act of 1947, is therefore not correct, and therefore his further submission that this Court has no jurisdiction is also not correct.

[12] It is clear on a reference to para. 1 of the written statement that the Act contemplated therein is the Act of 1947. Assuming that the Act of 1939 was the Act contemplated by the defendant, even then the material facts contemplated by S. 2, sub-s. (6) of that Act, which are necessary to constitute a "debtor" within the meaning of S. 2, sub-s. (6), are not set out — see S. 2 (6) (3), which says, "who has been cultivating such land personally from a date prior to the 1st of April 1937," and S. 2 (6) (4), which says, whose annual income from sources other than agriculture and manual labour does not ordinarily exceed, 20 per cent. of his total annual income, or does not exceed Rs. 300, whichever is greater. Now those are questions of fact which, in my opinion, should have been set out in the written statement. These are, however, not so set out, nor is the Act of 1939 referred to, and I am, therefore, confirmed in my opinion that the defendant is not entitled to raise any defence on the Act of 1939.

[13] Mr. Mody for the plaintiff points out that in the plaint it is stated in Para. 7 that the defendant resides in Bombay and that this allegation is not denied in the written statement. It is true that the defendant says in his written statement that he holds land for agricultural purposes in the Thana District and has been cultivating land personally which would suggest as if he was residing within the jurisdiction of the Thana Court. But both in the Act of 1939 and in the Act of 1947 the expression "to cultivate personally" has been defined to mean "to cultivate by one's own labour or by the labour of any member of one's family or by servants or hired labour under one's personal supervision or the personal supervision of any member of one's family."

From this it follows that a man may be residing in one place and cultivating land personally at another place. The defendant by his affidavit stated that he was residing at Borivli but he has not raised that contention by his written statement. Mr. Mody says that the word "Court" in the Act means the Court having ordinary jurisdiction in the area where the defendant resides, and he says that as the defendant must be deemed by his written statement to have admitted that he was residing in Bombay, it follows that the Bombay High Court has jurisdiction. But I must point out that that submission is not correct as the definition of the word "Court" refers to "ordinary" residence. Now a man may be residing at more than one place—see *Mulla's Civil Procedure Code*, Edn. 11, p. 116, *Orde v. Skinner*, 7 I. A. 196 : (3 ALL. 91 P.C.). But ordinary residence is not the same as residence. In my opinion if the defendant wanted to have this suit referred to the "Court" within the meaning of the Act of 1947, he should have mentioned the "Court" within whose jurisdiction he was ordinarily residing, as that is a question of fact and not of law.

[14] If, therefore, the defendant is not a "debtor" within the meaning of the Act of 1939 or the Act of 1947, it may well be that the whole of the above discussion was unnecessary. But I expressed my opinion on that question as the point about the defendant not being a "debtor" within the meaning of the Act of 1939 or the Act of 1947 was not argued before me.

[15] For the reasons aforesaid I answer Issue 1, namely, whether the defendant is a debtor within the meaning of the Bombay Agricultural Debtors' Relief Act, 1939 or 1947, in the negative.

[16] As regards Issue 2, namely, whether the defendant is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act, I refer the suit to the Commissioner for ascertaining whether the defendant's income from agricultural sources for three years prior to the institution of the suit exceeds the income from non-agricultural sources.

[17] As regards Issue 3, namely, if either of the first two issues is answered in the affirmative whether this Honourable Court has jurisdiction to try the suit, this will have to await the findings of the Commissioner.

[18] So also Issue 4 as to the amount due and payable to the plaintiff also will have to stand over.

[19] As regards costs, the defendant will have to pay to the plaintiff the costs of and incidental to the hearing of the first issue. Further costs and further directions are reserved.

D.H.

Order accordingly.

A. I. R. (36) 1949 Bombay 308 [C.N. 80.]

CHAGLA C. J. AND BAVDEKAR J.

Somabhai Shanabai Patel — Applicant v. Narandas Zaverdas — Opponent.

Civil Revn. Appln. No. 402 of 1947, Decided on 9th April 1948, from order of Civil Judge (Senior Division), Nadiad.

Bombay Agricultural Debtors' Relief Act (28 [XXVIII] of 1947), S. 19 (1) — Suit or other proceedings pending at date when application under S. 4 could be made to Special Court, can alone be transferred.

Under S. 19 (1) only such suits, appeals, applications for execution and proceedings can be transferred which were pending at the date when an application under S. 4 could be made to the Special Court set up under the Act. [Para 5]

The object of transferring the suit is to permit some other Special Court to try it and dispose of it. But if that other Court cannot deal with the suit because of the limitation laid down in the Act itself, then it cannot be said that the Legislature intended the suits to be transferred from the ordinary civil Courts to the Special Courts set up under the Act. [Para 4]

Where the suit was filed on 24th July 1946 when the last date for an application under the old Act 28 of 1939 was 31st October 1945 and when in fact S. 4 would not apply to the suit at all because no application could be made under that section, the suit cannot be transferred. [Para 5]

D. V. Patel—for Applicant.

C. K. Shah—for Opponent.

Chagla C. J. — This is a civil revisional application from an order made by the Civil Judge, (Senior Division) Nadiad. The applicant made an application that a suit which was pending before the learned Judge should be transferred to the Court set up by the Bombay Agricultural Debtors' Relief Act, 1947, under S. 19 of that Act and that application was rejected by the learned Judge.

[2] The facts may be briefly stated. The opponent filed a suit in the Court of the Civil Judge (Senior Division) Nadiad, on 24th July 1946, claiming from the petitioner Rs. 29,999 as a debt due at the foot of accounts subsisting between him and the petitioner. This debt was alleged to have been incurred between the dates 20th January 1945, and 15th December 1945. On 9th July 1947, the petitioner made an application to the Court for transfer of his suit to the Court under the Bombay Agricultural Debtors' Relief Act, and the question that has been argued before us by Mr. Patel is that the learned Judge was wrong in refusing the application, that the learned Judge had no jurisdiction to proceed with the suit, and the proper Court which was competent to try the matter was the Court set up by the Bombay Agricultural Debtors' Relief Act.

[3] In order to appreciate the argument it is necessary to look at the scheme of the Act, XXVIII [28] of 1947. The Act is intended for the

relief of agricultural debtors and the scheme is that Special Courts are set up for the adjustment of debts of these debtors. Relief is not intended to be granted to all debtors but only to debtors whose debt does not exceed the sum of Rs. 15,000. Before Act XXVIII [28] of 1947 was passed, another Act which dealt with the same subject-matter and which was intended for the same purpose was on the statute book and that Act was Act XXVIII of 1939. Under that Act Debt Adjustment Boards were also set up for the purpose of adjusting the debt of the agricultural debtors. The defendant is a resident of Thasara taluka and the Board for that taluka was established on 1st April 1945. The scheme of the Act is that applications for the adjustment of the debt can be made either by the debtor or by the creditor. But such an application has to be made within the time fixed by S. 4 of the Act and that time is that the application has got to be made before 1st August 1947, if a Board was established under the old Act on or after 1st February 1947. If the Board was established before that date, then no application can be made under this section. If such an application was made, it would be clearly barred. In this case a Board was established for the Thasara taluka under the old Act on 1st April 1945, and the last date for making the application to that Board was 31st October 1945, and therefore, as I read S. 4, it would not be open either to the debtor or to any creditor to make any application with regard to the adjustment of debts under S. 4 of this Act. Section 11 provides that no application under S. 4 or S. 8, which deals with settlement of debts arrived at between debtors and creditors, shall be entertained by the Court on behalf of or in respect of any debtor, unless the total amount of debts due from him on the date of the application is not more than Rs. 15,000. Section 15 makes all debts void in respect of which no application for adjustment or settlement is made. Section 17 provides for the decision by the Court under the Act of two preliminary issues: one is whether the person for the adjustment of whose debts the application has been made is a debtor and the second is whether the total amount of debt due from such person on the date of the application exceeds Rs. 15,000, and if that Court finds either that such a person is not a debtor or that the amount of debts is more than Rs. 15,000, then the Court must dismiss the application. Then we come to S. 19 which calls for an interpretation at our hands. That section deals with pending suits, appeals and applications, and it provides that all suits, appeals, applications for execution and proceedings other than revisional in respect of any debt pending in any civil Court or revenue Court shall, if they involve the questions whe-

ther the person from whom such debt is due is a debtor and whether the total amount of debts due from him on the date of the application exceeds Rs. 15,000, be transferred to the Court. The section is by no means very happily worded, but we have to take legislation as we find it and give to it such effect as we possibly can.

[4] It is contended by Mr. Patel that as he has raised the question in the suit that he is a debtor and that his debt does not exceed Rs. 15,000, the suit under this section must be transferred to the proper Court. It is important to note that when the suit was filed, viz., 24th July 1946, it was not open to the debtor or to any creditor to file any application with regard to the adjustment of debts or settlement of debts. The last date for doing so had already expired on 31st October 1945. Therefore, the submission that is made to us and which we are asked to accept is that although the time for making the application for adjustment or settlement of debts had already expired when the suit was filed, still that suit being a pending suit within the meaning of S. 19 should be transferred to the Court set up under the Act. If we were to accede to this contention, a very curious and to my mind a very illogical result would ensue. Indisputably, if no suit had been filed by the creditor, neither the debtor nor he nor any other creditor could have made an application for the adjustment of debts under S. 4 of the Act. If such an application had been made, it would be clearly barred and could not have been dealt with by the Court set up under the Act. According to Mr. Patel, merely because a suit is filed, the pendency of that suit gives a higher and a better right to the debtor than would have been enjoyed by him if no such suit had been filed. That to my mind is an entirely untenable contention and a contention which does not fit in with the general scheme of the Act. Under the Act, applications were only permitted up to a certain date and the Act lays down the consequences of not making those applications, and those consequences are, that the debts become void. It is also the scheme of the Act that where there are questions which can be decided by the Courts set up under the Act, the ordinary civil Courts should not decide those questions and therefore pending suits should be transferred and the Special Courts should be left to decide those questions. But it could not possibly have been intended and it is not intended, as far as I can see, that suits should be transferred although the questions raised by those suits can no longer be dealt with or disposed of by the Special Courts set up under the Act. The object of transferring the suit is to permit some other Special Court to try it and dispose of it. But if that other Court cannot deal with the suit because

of the limitation laid down in the Act itself, then it cannot be said that the Legislature intended the suits to be transferred from the ordinary civil Courts to the Special Courts set up under the Act.

[4a] Section 19 (2) contains a provision that where an application made is under S. 4 or a statement submitted pursuant to that application under S. 14 includes a debt in respect of which a suit is pending, then the Court shall issue a notice to the civil Court, and on the receipt of such notice the pending suit is to be transferred. Here again, the assumption is that the application made to the Court under S. 4 was an application which was within time. No Court can issue a notice under sub-s. (2) unless the application made was an application which was not barred by limitation under S. 4. Sub-section (3) provides that when a transfer has taken place either under sub-s. (1) or sub-s. (2) of S. 19, the Special Court shall proceed as if an application under S. 4 had been made to it. Here again the Court is empowered when the transfer has been made to proceed on the footing and on the basis as if an application has been made under S. 4 of the Act. But the Court could not deal with these transferred suits or appeals or applications unless it was competent, unless the application if made to it under S. 4 had been within time.

[5] Therefore, in my opinion, under S. 19 (1) only such suits, appeals, applications for execution and proceedings can be transferred which were pending at the date when an application under S. 4 could be made to the Special Court set up under the Act. As this suit was filed on 24th July 1946, when the last date for an application under the old Act was 31st October 1945, and when in fact S. 4 would not apply to this suit at all because no application could be made under that section, in my opinion, the learned Judge was right in the view he took and rightly dismissed the petitioner's application. The revision application, therefore, fails and the rule must be discharged with costs.

[6] **Baydekar J.** — The question is to what cases S. 19 (1) of the new Act has application, and in so far as the present Act is based to a very large extent upon the old Act, it would not be out of place to refer to the corresponding provisions of the old Act. Corresponding to S. 19 (2) there was in the old Act, S. 37 (2) which permitted the Board to give notice when application for adjustment had been made to it and it came to its notice that there was a suit pending in a civil Court about a debt mentioned by the debtor or creditor in the application for adjustment or by a creditor in a statement made by him in answer to a notice issued by the Board. Upon receipt of

such notice, the Court was bound to transfer the suit to the Board. Just as in the case of the present Act, the old Act provided that applications for adjustment both by the creditors and the debtors should be made before a particular date, and in case any such application was not made, then all debts would be extinguished in accordance with the provisions of S. 32 of the old Act, and I think that S. 37 (1) was intended to apply to suits, applications for execution and proceedings which were pending in a Court before the time prescribed for making an application whether by a debtor or a creditor had expired. Under S. 37 (2) of the old Act the Board could not give notice to the Court when no application had been made to it. It was then for the creditor or the debtor in the suit which was pending to move the Court saying that the application should be transferred on the ground that the debtor was a debtor under the Act and there was an issue between him and the creditor that his debts were less than Rs. 15,000. I have no doubt that if the creditor did not come forward to make such an application to the Court, the debtor would come forward to do so, and the proceedings would be transferred and the Board would proceed as if on an application for adjustment having been made with the result that the debtor would not have had to make an application for adjustment in a hurry or to allow the civil Court to proceed to judgment and perhaps to execution without adjustment of the suit debt.

[7] It is no doubt true that the words of both S. 37 (1) and S. 19 (1) are general and that has made it possible for Mr. Patel to argue that if a suit or appeal or application is pending at any time before a Court and an application is made to the Court by a debtor saying that the total amount of debts due by him does not exceed Rs. 15,000, the Court must send the suit to the Court under the present Act. He says similarly the Court had to send the proceedings of the suit to the Board under the old Act upon receiving the prescribed notice. But if sub-s. (1) of S. 37 of the old Act or S. 19 of the new Act are to be construed in this manner, sub-s. (2) in both cases would be superfluous. Mr. Patel says that it was enacted to provide for recalcitrant cases. Now, one can understand that a creditor may not want to move the Court for a transfer to the Board or Court constituted under the present Act but the debtor would always want to do so and in any case the Court or Board would ordinarily come to know of a suit when one of the parties informed it of its existence.

[8] There is, however, another reason why the operation of sub-s. (1) should be limited to the period before the date when the last date for making applications for adjustment had not

expired. Under the provisions of the third clause of both the sections of the old and the new Acts, where the suit or application for execution or proceeding is transferred to a Court, the Court must proceed as if upon an application for adjustment of the debts had been made to it. When an application for adjustment of debts is made to the Court, it must give notice to the creditors and the creditors have got to file statements before it of debts which are due to them. If a suit or appeal or application for execution is transferred to a Court after the time prescribed for making an application for adjustment of debts is passed, the creditors would be entitled to file an application of the debts due to them. Mr. Patel says that even if they did file such application, their debts would have been extinguished in case they had not made any application by the last date provided for such applications. I am not so sure that that result would follow because under S. 32 of the old Act every debt due from a debtor who ordinarily resides within the local area for which a Board is established under S. 4 or who belongs to a class of debtors for which a Board is established under the said section, in respect of which no application has been made under S. 17 within the period specified in sub-s. (1) of the said S. 17, or in respect of which no application for recording a settlement is made under S. 23 within the period specified in the said S. 23 or in respect of which an application is made to the Board is withdrawn under S. 27 and no fresh application is made under S. 17, and *every debt due from such debtor* in respect of which a statement is not submitted to the Board by the creditor in compliance with the provisions of S. 31 shall be deemed to have been duly discharged. There is a corresponding provision in the present Act. It is arguable, of course, that even though the words underlined (here italicized) occur in S. 32 and corresponding words occur in the corresponding section of the present Act, if a creditor has not made an application within time the debt will be extinguished notwithstanding the fact that the creditor mentions the debt in a statement which is submitted to the Board under the provisions of S. 31 of the old Act and the corresponding provision of the present Act. But that is by no means clear. Secondly, there is the question of the debt to which the pending suit or proceeding relates. If S. 32 (1) of the old Act is not to be read subject to S. 37 and S. 15 of the new Act is not to be read subject to S. 19, that debt will be extinguished or void. What then is the use of transferring the suit to the Board or Court? It could hardly be, as Mr. Patel says, in order to enable the Board or Court constituted under the new Act to pronounce it to be extinguished or void. In my

opinion the only way of avoiding the superfluity and difficulty pointed out above is to read sub-s. (1) of S. 37 of the old Act and S. 19 of the new Act as intended to apply at a time when the time for making an application for adjustment of debts to the Court, whether by a creditor or a debtor has still not expired. Nobody is likely to be prejudiced in case that meaning is ascribed to S. 37 (1) except a creditor who has not made an application for adjustment in time, but I think there was enough notice to creditor both in the old as well as the new Act that if he refrained from making an application in time he did so at his peril.

[9] It may be that when an application for adjustment of debts is made to a Court, the debtor may be entitled to have an adjustment not only of his debts at the time whether application was made but also of debts which he may have incurred after the date prescribed for making an application for adjustment had passed. But that will not matter, because in case the debtor has incurred such a debt and the creditor has filed his suit in respect of it, it is open to the debtor who had made an application for adjustment to move the Court, proper steps being taken under S. 19 (2). I, therefore, agree with the order which has been proposed by my learned brother.

R.G.D.

Revision dismissed.

A. I. R. (36) 1949 Bombay 311 [C. N. 81.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Shamrao Babaji Lokare — Defendant 1—Appellant v. Bhimrao Kondi Lokare and another — Plaintiffs — Respondents.

Second Appeal No. 1174 of 1944, Decided on 20th July 1948.

Hindu law — Adoption — Widow — Son dying leaving his son and widow — Widow's power to adopt is extinguished and is not revived after death of grandson and widow-daughter-in-law.

The test to determine whether a widow has the power to adopt or not on the death of her son, is, has that son left a son or has that son left a widow? If either of the contingencies is present, then the widow has no longer the power to adopt. It comes to an end and is extinguished and is not revived after the death of both the grandson and the son's widow : A.I.R. (20) 1933 P. C. 155, *Expl. and Foll.* ; 26 Bom. 526 ; 10 M. I. A. 279 (P. C.) and A. I. R. (22) 1935 P. C. 95, *Rel. on* ; A. I. R. (32) 1945 Bom. 164, *Disting.* ; A.I.R. (28) 1941 Nag. 116, *Dissent.* [Paras 4 and 6]

V. S. Desai — for Appellant.

B. N. Gokhale — for Respondent 1.

Chagla C. J. — This appeal raises a very interesting question concerning the Hindu law of adoption. The facts giving rise to the appeal are that one Babaji died leaving a widow Anubai and a son Krishna. Krishna married Vitha. Krishna died on 27th October 1918, leaving a son

Changdeo. Changdeo died on 28th October 1918, and Vitha died in 1928. Anubai adopted to her husband defendant 1 on 14th May 1934, and the suit was filed by the next reversioners challenging the adoption. Both the lower Courts took the view that the adoption was bad.

[2] It is urged by Mr. Desai on behalf of the adopted son that since the recent Privy Council decision a revolutionary change has taken place with regard to the view taken by the Courts in India as to the nature and effect of adoption. Originally decisions on adoption emphasised the property aspect of adoption and those decisions were also coloured by the English view of the law of property. The idea was shocking to an English lawyer that a property which had become vested for a long time should become divested on an adoption taking place. But the Privy Council has now emphasised that primarily the adoption must be looked at from the point of view of its religious and spiritual efficacy and that considerations with regard to the vesting and divesting of property are merely incidental. The Privy Council has also emphasised the Brahminical doctrine that it is the duty of a Hindu to see that his male line is continued and adoption is resorted to in order to give effect to that Brahminical doctrine. Now, in this case, it will be realised that it is the grandmother who is adopting, as when her son Krishna died on 27th October 1918, he left both a son and a widow. Mr. Desai's contention is that on the death of Vitha there was no one who could continue the male line of Babaji and, therefore, the power of Anubai to adopt which was merely suspended so long as Vitha was alive revived and she became capable of adopting after 1928, and, therefore, what she did on 14th May 1934, was with a view to continue the male line of Babaji which, but for the adoption, would have become extinct.

[3] Now, this view, if accepted, would be wholly contrary to a Full Bench decision of this Court in *Ramkrishna v. Shamrao*, 26 Bom. 526 : (4 Bom. L. R. 315). In that case Fulton, Crowe and Chandavarkar JJ. held that where a Hindu dies leaving a widow and a son, and that son himself dies leaving a natural born or adopted son or leaving no son but his own widow to continue the line by means of adoption, the power of the former widow is extinguished and can never afterwards be revived. Chandavarkar J. delivering the judgment of the Bench mainly relied for the decision on the judgment of the Privy Council in *Mt. Bhoobun Moyee Debia v. Ramkishore Achraj Chowdhary*, 10 M. I. A. 279 : (2 Sar. 111 P. C.) and Chandavarkar J. points out that in the decision of the Privy Council Lord Kingsdown gives three illus-

trations to point out when the power of a widow to adopt is extinguished. The first case is where a Hindu dies leaving a widow and a son and where through that son the line is continued down to a grandson. The second illustration is where a Hindu dies leaving a widow and a son and where the line has been continued to a great grandson. And the third illustration was that of the actual facts of *Bhoobun Moyee's case* : (10 M. I. A. 279 : 2 Sar. 111 P. C.), where a Hindu died leaving a widow and a son and that son died married, leaving a widow as heir. It was pressed upon this Bench that the principle that they were laying down was not in accordance with either the letter or the spirit of the Hindu law as expounded in the books or as understood by the Hindus themselves. Chandavarkar J. rejected that contention saying that it was not open to the learned Judges to go into that question as they must accept the law as laid down in *Bhoobun Moyee's case* : (10 M. I. A. 279 : 2 Sar. 111 P. C.). It is also necessary to point out that Chandavarkar J. takes the view that there is and there must be some limit to the power of the widow to adopt, because Mr. Chaubal at the bar argued that a widow could adopt without any limit as to the period within which adoption may be made and her power was never at an end—it was only suspended so long as the estate was vested in others, but directly it came to her from those others it was revived.

[4] Now, Mr. Desai's contention is that the law laid down by this Full Bench is no longer good law especially in view of the decision of the Privy Council in *Amarendra Mansingh v. Sanatan Singh*, 60 I. A. 242 : (A. I. R. (20) 1933 P. C. 155). In our opinion, far from the validity of the Bombay Full Bench decision being shaken by the Privy Council, the Privy Council has affirmed and emphasised the principle underlying that decision. In the first place, the Privy Council in this case themselves agree that some limit must be placed upon the power of the widow to adopt, and this is what they say at p. 249 of the judgment :

"But that there must be some limit to its exercise, or at all events some conditions in which it would be either contrary to the spirit of the Hindu doctrine to admit its continuance, or inequitable in the face of other rights to allow it to take effect, has long been recognised both by the Courts in India and by this Board, and it is upon the difficult question of where the line should be drawn, and upon what principle, that the argument in the present case has been mainly turned."

With respect, the Privy Council in this case has addressed itself to that difficult question and has drawn the line and has stated a principle which goes to show the limit of the widow's power to adopt, and the principle that they have laid down is that when at the death of her son there is his

widow or a grandson, then the power of the widow is extinguished and cannot be revived. Therefore, in order to determine whether a widow has the power to adopt or not on the death of her son, the test that has got to be applied is, has that son left a grandson or has that son left a widow? If either of the contingencies is present, then the widow has no longer the power to adopt. According to Mr. Desai the power is not extinguished but merely suspended so long as the grandson or the widow of the son are in existence, but on the death of both the suspended power revives and the widow again becomes capable of adopting. In our opinion, this submission is contrary to the express words used by the Privy Council stating that the power of the widow is not suspended but extinguished. At p. 259 their Lordships consider at what particular moment in the son's life is the mother's power to adopt extinguished and the conclusion they come to is stated at p. 260, viz. that the power of adoption would be extinguished and not merely suspended on the son's death by the survival of either a grandson or the son's widow. This conclusion their Lordships arrived at after a careful consideration of the earlier decisions of the Board itself and also various decisions of the Indian High Courts including the decision in *Ramkrishna v. Shamrao* (26 Bom. 526 : 4 Bom. L. R. 315). Therefore it is no longer a matter of doubt or dispute or a matter for speculation as to what is the limit of a Hindu widow's power to adopt. The doubts and difficulties are set at rest and the principle has been clearly enunciated by the Privy Council. Mr. Desai has relied on a passage in the case of *Bhoobun Moyee* (10 M. I. A. 279 : 2 Sar. 111 P. C.), where their Lordships say that as long as the wife survives one-half of the husband survives, and according to Mr. Desai, so long as Anubai survived, in her one-half of Babaji survived, and when Changdeo and Vitha were no longer in existence she could continue the male line as much as Babaji could have if he had been alive. Now, it would be erroneous to compare the powers of Babaji himself to adopt with those of his widow. Although she is given power under Hindu law to continue the line of her husband, those powers are by no means unlimited or unrestricted. There are many circumstances under which Babaji could have adopted whereas Anubai could not have. It is also true that the well-known doctrine of Hindu law is that the male line of a Hindu is not extinguished so long as there is a potential mother. But the whole question that has got to be determined in every case is whether the potentiality of the mother has come to an end or not. It is not as if the mother continues to be potential throughout her

life and her potentiality never comes to an end. The principle enunciated in *Amarendra's case* (60 I. A. 242 : A. I. R. (20) 1933 P. C. 155) is reiterated and re-emphasised in the later decision of the Privy Council in *Vijaysingji Chhatrasingji v. Shivsangji Bhimsangji* (62 I. A. 161 : A.I.R. (22) 1935 P. C. 95) and at p. 165 their Lordships of the Privy Council enunciated the principle of *Amarendra's case* (60 I. A. 242 : A. I. R. (20) 1933 P. C. 155) in these words :

"As observed by this Board in *Amarendra Mansingh's case* (60 I. A. 242 : A.I.R. (20) 1933 P. C. 155), the power of a widow to adopt does not depend upon the question of vesting or divesting of the estate. The purpose of adoption is to secure the continuance of the line, and when the natural son has left no son to continue the line, nor a widow to provide for its continuance by adoption, his mother can make a valid adoption to her deceased husband, although the estate is not vested in her."

[5] Our attention has been drawn to two cases which, according to Mr. Desai, go counter to the principle laid down in *Ramkrishna v. Shamrao* (26 Bom. 526 : 4 Bom. L. R. 315). The first is a decision which I gave sitting singly reported in *Pandurang Bhau v. Changunabai*, 46 Bom. L. R. 913 : (A. I. R. (32) 1945 Bom. 164). The facts of that case were very peculiar. There a Hindu father had two sons and he died leaving those two sons and his widow. The elder son died leaving a widow and two days later the younger son died unmarried and the mother made an adoption, and the question was whether the adoption was good, and the view I took was that as the younger son had died without leaving a widow or a son, the mother's power of adoption had not come to an end and she could, therefore, validly adopt the plaintiff. It will be noticed that at the date of the death of the younger son there was neither a widow, either his or the elder brother's nor a grandson who could continue the male line, and it should also be noticed that so long as the younger son was alive there would be no question of the power of the widow of the elder son as far as the continuation of the line of the father was concerned because the younger son was there to continue the line. The next case on which reliance was placed is a decision of the Nagpur High Court in *Bapuji v. Gangaram*, I. L. R. (1941) Nag. 178 : (A. I. R. (28) 1941 Nag. 116). In that case, a Hindu died leaving a widow and a son and the son died leaving a widow only. It was held that on the remarriage of the widow of the son the power of the mother to adopt revived. Now, with very great respect to the Nagpur High Court, what the learned Judges attempted to do was logically to extend the principle in *Amarendra's case* (60 I. A. 242 : A. I. R. (20) 1933 P. C. 155). It is not always safe to extend logically the principle to be deduced from a

particular decision. A decision is good for the facts of that particular case, and to apply it to a different set of facts with regard to which different considerations would apply is not always a sound principle. It is perfectly true that every case does not merely decide with regard to the particular facts, but there also can be enunciated and deduced a principle arising out of that case. But to extend that principle merely because logic requires it, is an attempt which is always a rather hazardous one, and according to the Nagpur High Court the true rule that they deduced from the Privy Council decisions and the other decisions of Indian High Courts which they considered, is that the grandmother's power is suspended by the interposition of various persons, son, son's widow, son's son and revives with the removal of the obstacle. Now, with great respect again, this rule is quite contrary to what is expressly stated by the Privy Council in *Amarendra's case* (60 I. A. 242 : A. I. R. (20) 1933 P. C. 155) to which we have drawn attention. Our High Court also considered *Amarendra's case* (60 I. A. 242 : A. I. R. (20) 1933 P. C. 155) in *Ramchandra v. Murlidhar*, 39 Bom. L. R. 599 : (A. I. R. (25) 1938 Bom. 20) and on facts similar to the facts before the Nagpur High Court came to a contrary conclusion.

[6] Applying therefore the principle, which in our opinion is deducible from the decision of the Privy Council in *Amarendra's case* (60 I. A. 242 : A. I. R. (20) 1933 P. C. 155) to the facts of the case before us, the question that we have to ask and answer is, what was the position when Krishna died on 27th October 1918. The answer to that question is that there was a widow and a grandson capable of continuing Babaji's line. As that was the position on the death of Krishna Anubai's power to adopt came to an end and was extinguished, and the fact that both Changdeo and Vitha died did not bring about a revival or renewal of that power to adopt which had already come to an end. The result, therefore, is that the adoption of defendant 1 by Anubai was not a valid adoption. We agree with the decision of both the lower Courts. The appeal fails and must be dismissed with costs.

R.G.D.

*Appeal dismissed.***A. I. R. (36) 1949 Bombay 314 [C. N. 82.]****FULL BENCH****CHAGLA C. J., GAJENDRAGADKAR AND
TENDOLKAR JJ.***Vijaysingrao Balasaheb Shinde Desai —
Appellant v. Janardanrao Narayanrao Shinde
Desai and others—Respondents.*

First Appeal No. 101 of 1944, Decided on 29th March 1949, from decision of Joint Civil Judge (Senior Division) at Belgaum in Special Suit No. 347 of 1939.

(a) Hindu law — Succession—Custom—Onus — Person alleging rule of primogeniture must establish it. (*Order of Reference.*)*In Order of Reference.* — To every estate held by Hindus, whatever its character, the ordinary Hindu law of succession applies, and it is for the party who alleges that a different law of succession applies, to prove it as a matter of custom. Where a party sets up a rule of primogeniture, he must establish it. [Para 2]**(b) Bombay Hereditary Offices Act (III [3] of 1874), S. 4 —** Person acquiring watan property or having hereditary interest without acquiring watan office or being under obligation to perform services is watandar : 41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414 : 185 I. C. 874, **OVERRULED.**A person who acquires watan property or has hereditary interest in it without acquiring the watan office and without being under any obligation to perform the service attached to the office is a watandar within the meaning of the Watan Act, 1874: 41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414 : 185 I. C. 874, **OVERRULED** ; A. I. R. (22) 1935 Bom. 380, *Approved.*

[Para 10]

*G. R. Madbhavi — for Appellant.**D. R. Manerikar (for 1 & 14), P. V. Vaze (for 3, 7 & 9) and H. B. Datar (for 5, 6 & 13)—for Respondents.***ORDER OF REFERENCE**

Chagla C. J. — This appeal arises out of a suit filed by the plaintiff for partition and for possession of his half share in the properties in suit. The plaintiff's case was that these properties were joint family properties, and the joint family consisted of his father Narayanrao, his elder brother Balasaheb and himself. Narayanrao died in 1927, Balasaheb died on 5th January 1934, and according to the plaintiff he became the *karta* of the family on the death of Balasaheb. Balasaheb left two sons, defendants 1 and 2. According to the plaintiff, there were disputes between him and defendants 1 and 2 and hence he filed a suit for partition. He also in this suit challenged various alienations made by his father Narayanrao and brought the alienees on the record of the suit. The defence of defendant 1 was that the properties in suit were watan properties, they were impartible and governed by the rule of primogeniture, and therefore, on the death of Narayanrao, Balasaheb would inherit those properties, and on the death of Balasaheb, he as the elder son would be entitled to them. He also contended that the junior branch of the family were entitled only to maintenance and that the plaintiff was only entitled to maintenance and that such maintenance had been given to him. The learned trial Judge gave a declaration in favour of the plaintiff that he was entitled to half share in the properties in suit. With regard to the alienations he held that they were binding on the parties to the suit.

[2] In this appeal two main questions have been argued. The first is with regard to the question whether the properties in suit consti-

tute an impartible estate or whether they are subject to the same ordinary Hindu law of succession. It is now well settled law that to every estate, whatever its character, the ordinary Hindu law of succession applies, and it is for the party who alleges that a different law of succession applies to prove as a matter of custom. The plaintiff's case with regard to these properties was that they were given by the Adilshahi dynasty to Parsoji Basaji as watan lands in lieu of services to be rendered by him, that these lands were impartible, and that they descended by primogeniture. After Parsoji there were two branches of the family which have been referred to in this litigation as the Eskambekar branch (which we shall call the E branch), and the Ghosarwedkar branch (which we shall refer to as the G branch). It was the case of defendant 1 that for some time the lands were wrongfully seized by the G branch, but ultimately in 1707 the lands were regranted to Sambhaji belonging to the E branch, which according to him was the senior branch. Subsequently, part of these lands again went to the G branch, and when the British Government arrived on the scene in 1836 they recognized the G branch as the representative watandars. Then one Janabai, the mother of Narayanrao, filed a suit in Belgaum Court, being suit No. 135 of 1879, against Gangabai, the representative of the G branch, for possession of the suit lands. This litigation ultimately ended in appeal to the High Court on 24th March 1887, and by a consent decree Janabai was given 25 lands and Gangabai was ordered to pay the whole of the judi. These are the lands which are now in suit.

[3] Now, let us briefly consider what is the evidence with regard to the question of custom with regard to impartibility. (His Lordship discussed the evidence and continued:) The learned trial Judge in a very careful judgment has considered the whole of the evidence, both oral and documentary, led by both the parties on the question of custom, and having considered the evidence we are entirely in agreement with him that defendant 1 has failed to discharge the burden which was on him to establish custom which departs from the ordinary Hindu law of succession. Therefore, the learned Judge was right when he held that on the death of Narayanrao, Balasaheb and the plaintiff became entitled to a half share each in the properties left by Narayanrao and therefore the declaration he gave in favour of the plaintiff must be upheld.

[3a] The other question raised in this appeal is with regard to the alienations made by Narayanrao and which are challenged by the plaintiff and supported by defendants 1 and 2 under S. 5, Watan Act. These alienations are five

in number and they are represented by Exhs. 294, 295, 309, 308 and 285. Exhibits 294, 309 and 285 are possessory mortgages. Exhibits 295 and 308 are leases, and Mr. Madbhavi does not challenge the finding of the trial Court that rent has been received after the death of the alienor and that they have become annual tenants of the parties and they can only be ejected by a proper notice to quit served according to law. Therefore, with regard to these exhibits the decision of the trial Court must be upheld, viz., that they cannot be challenged by the plaintiff. But the difficulty arises with regard to the possessory mortgages, Exhs. 294, 309 and 285. The learned trial Judge held that Narayanrao was not a watandar within the meaning of the Watan Act and that therefore these alienations cannot be challenged under S. 5 of the Act. Section 5 of the Act contains a prohibition against alienations of watan property and watan rights, and such alienations if made cannot endure beyond the lifetime of the alienor. But the question that falls to be determined is whether Narayanrao was a watandar within the meaning of the Watan Act. If he was not a watandar, then the ordinary law would apply and there is no reason why these alienations should not hold good. Watandar has been defined in S. 4 of the Act in these terms:

"Watandar means a person having a hereditary interest in the watan. It includes a person holding watan property acquired by him before the introduction of British Government into the locality of the watan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It includes a person adopted by an owner of a watan or part of a watan subject to the conditions specified in sections 33 to 35."

And the question is whether the first part of the definition is an exclusive and exhaustive definition and the latter part merely illustrative, and further whether the illustrations given in the latter part must fall within the ambit of the exclusive definition given in the first part, or whether the whole definition must be looked upon as one, the second part being supplementary and additional to what is contained in the first part. The importance of deciding this will become immediately apparent, because if the first part of the definition is exclusive and exhaustive, then only such a person would be watandar who has a hereditary interest in the watan, and watan is defined as not only watan property but also the hereditary office and the rights and privileges attached to them, the property and the rights together constituting watan. Therefore, if a person acquired property before the introduction of the British Government into the locality of the watan, without at the same time acquiring a right to the privileges of the office, he would not be a watandar. Similarly, if he acquired watan

property subsequent to the introduction of the British Government, he would equally not be a Watandar unless the property carried with it a right to the office. In this case it is admitted and it is not in dispute that the plaintiff and defendants 1 and 2 have no right to the office of the Watandar. They only hold watan property, and if the definition of Watandar is to be construed in the light which we have suggested, then undoubtedly the trial Court would be right and Narayanrao would not be a Watandar and the alienations made by him could not be challenged in this suit.

[4] Now, the trial Court relied on a judgment of a Divisional Bench of this Court in *Tarabai v. Murtacharya*, 41 Bom. L. R. 924 : (A. I. R. (26) 1939 Bom. 414). The Bench consisting of Sir John Beaumont, Chief Justice, and N. J. Wadia J. were considering the question of the special law of inheritance to watan property enacting the Watan Amending Act of 1886. That Amending Act lays down certain rules as to succession to property in watan families and it prefers male members to female members, postponing the latter till the male members are exhausted, and this Bench took the view that this special law of inheritance did not apply to a person who merely acquired watan property without acquiring the office and without being under any obligation to perform the services attached to the office, as he was not a watandar within the meaning of the Watan Act, and in coming to that conclusion Sir John Beaumont considered the definition of watandar in the Act and came to the conclusion that the primary definition of a watandar was that he was a person having a hereditary interest in a watan, that is, the office and the property, if any, and that the subsequent words were merely explanatory of the primary definition and did not curtail it. With very great respect to this Bench, in coming to this conclusion they overlooked several important considerations. In the first place, they overlooked the fact that what they had to decide with regard to S. 2 of Act V of 1886 was, what was a watan family, and watan family was defined under S. 4, Watan Act and that definition was that family includes each of the branches of the family descended from an original Watandar. Therefore, the watan family was confined to the branches of the original acquirer of the watan land. If there was an alienation, the alienee and his family could never become watan family within the meaning of the Act, and S. 2 of Act V of 1886 only applied to the watan family. That is, the special law of succession laid down only applied to the original acquirer and his family, and, undoubtedly, in the case of the original acquirer he would have not only the watan property but also the right

of office. They also overlooked the fact that before the advent of the British Government alienations by Watandars were not prohibited and watan properties had passed to various alienees and such alienations undoubtedly would be without the right to office going with it. Therefore, if that was the true definition of Watandar, then all persons who had acquired watan lands in the pre-British Government days could never fall into the class of Watandars. They also overlooked the fact that the Act defines a representative Watandar as a watandar registered by the Collector under S. 25 as having a right to perform the duties of hereditary office, and therefore the Act itself clearly makes a distinction between a Watandar who may merely possess watan property and a Watandar who not only possesses watan property but also has the right to perform the duties of the office. Therefore, to say, with great respect, that every Watandar within the meaning of the Act must have a right to perform the duties of the office seems to be contrary to both the intention of the statute and the plain language used by it in distinguishing the two cases of a Watandar and a representative Watandar. Section 5 itself deals separately with the two cases of a Watandar alienating any watan or part thereof or interest therein and the case of a representative Watandar alienating any right with which he is invested as such under the Act. This, again, contemplates a Watandar having only watan lands without the rights of office alienating those lands or part of those lands. Again, with respect to the Bench, the case in *Kadappa Bapurao v. Krishtappa*, 37 Bom. L. R. 599 : (A. I. R. (22) 1935 Bom. 380), was not cited before them, otherwise in coming to the decision they did they ought to have held that that case was wrongly decided. That was a case where there was an alienation of watan property by a Watandar to his *bhaubandh* for maintenance and Rangnekar and Divatia JJ. held that that alienation was valid beyond the lifetime of the Watandar because the alienation was to a Watandar of the same watan. Now obviously, when watan land is given to a *bhaubandh* for maintenance, it does not carry with it any right to an office of a Watandar, and if the right to office is a prerequisite of a person being a Watandar, then obviously a *bhaubandh* who received property for maintenance can never be a Watandar. If that be so, then the alienation in this case was to a person who was not a Watandar and the decision of Rangnekar and Divatia JJ. was wrong, if the decision in *Tarabai v. Murtacharya*, (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414) was right. *Tarabai v. Murtacharya* (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414)

came to be considered by another Divisional Bench of this Court consisting of Broomfield and Macklin JJ. in *Venkatrao Shrinivasrao v. Basavprabhu Lakhamgouda*, 45 Bom. L. R. 754: (A. I. R. (30) 1945 Bom. 348), and this Bench accepted the same definition of Watandar as given in *Tarabai's case* (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414). An application was made to them to refer the case to a Full Bench and they declined to do so. The case of *Mullappa v. Tukko* (39 Bom. L. R. 288: (A. I. R. (24) 1937 Bom. 307), was cited before them for the purpose of showing that there was a conflict of decisions with regard to the definition of Watandar in this Court, and Macklin J. took the view that in *Mallappa's case* (39 Bom. L. R. 288: A. I. R. (24) 1937 Bom. 307) the point was not specifically raised and therefore no question of conflict arose. It is true that in *Mallappa v. Tukko* (39 Bom. L. R. 288: A. I. R. (24) 1937 Bom. 307) on the facts it is clear that there was a grant by the inamdar of a pot-inam to the ancestor of the plaintiffs in that case and the plaintiffs filed the suit for a declaration that they were the Watandars, and Broomfield J., himself, who was a party to the decision in *Venkatrao Shrinivasrao v. Basavprabhu Lakhamgouda* (45 Bom. L. R. 754 : A. I. R. (30) 1943 Bom. 348), at p. 293, discussing the findings of the lower Court, states that on the merits the Judge finds that there was a grant of lands to the plaintiff's ancestor in 1811 and that they are therefore Watandars of the same watan within the definition in S. 4, Watan Act, and then turning to the issues that arose, at p. 294 he sets out issue 3 as follows :

"Whether the plaintiffs are watandars of the same watan, which means, as admittedly they are not members of the watan family, whether there was a grant to them before the introduction of the British rule in 1827 or 1828 : see the definition of 'watandar' in S. 4, Watan Act."

Therefore, the right of the plaintiffs to be declared as Watandars depended upon their acquiring watan land before the introduction of British rule and that was independently of their having received the right of office. On the contrary, it is clearly assumed that the plaintiffs had no right to the office of Watandars as they did not belong to the watan family. But Macklin J. is right when he says in *Venkatrao Shrinivasrao v. Basavprabhu Lakhamgouda* (45 Bom. L. R. 754 : A. I. R. (30) 1943 Bom. 348) that this particular question was not argued at the bar or considered by the Court when they decided *Mallappa's case* (39 Bom. L. R. 288 : A. I. R. (24) 1937 Bom. 307). But we find that the case of *Kadappa Bapurao v. Krishtappa* (37 Bom. L. R. 599 : A. I. R. (22) 1935 Bom. 380) was not cited before that Bench. If it had been, we feel certain that

it would have been very difficult for that Bench to resist an application for the point being referred to a Full Bench. This matter again came before my brothers Sen and Bavdekar JJ., in First Appeal No. 193 of 1943, and Sen J., delivering an interlocutory judgment realised the difficulty created by the decision in *Tarabai's case* (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414) and he also realised the necessity for a clarification of the matter by a Full Bench. But the matter was not referred to a Full Bench because the findings of fact by the lower Court were not clear, and therefore Sen and Bavdekar JJ., sent back the case for a finding on certain issues. When the case came back, this Court (Bavdekar and Dixit JJ.) held that the acquirer of the watan land had also a hereditary interest in the office and therefore the case fell under Part I of the definition of Watandar and it was not necessary to consider what was the true meaning of Part II of the definition of Watandar, and therefore no necessity arose for a reference of this question to a Full Bench.

[5] But in this case before us, the point fairly and squarely arises, and I think it is necessary that a Full Bench of this Court should decide whether the case of *Tarabai v. Murtacharya* (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414) was rightly decided inasmuch as it construed the definition of watandar under the Watan Act. We, therefore, formulate the following question for decision by the Full Bench :

"Whether the person who merely acquires watan property without acquiring the office and without being under any obligation to perform the service attached to the office, is or is not a watandar within the meaning of the Watan Act of 1874 ?"

[6] The appeal as between the plaintiff and defendant 1, as we have stated earlier, results in the decree of the trial Court being affirmed in favour of the plaintiff. The appellant, therefore, must pay the costs of the appeal to respondent 1. With regard to the question as between the plaintiff and the alienees, the appeal will stand over till the decision of the Full Bench.

[The reference was heard by a Full Bench consisting of Chagla C. J., Gajendragadkar and Tendolkar JJ.]

Judgment of Full Bench

[7] *Gajendragadkar J.*—The question which has been referred to the Full Bench lies within a very narrow compass. It relates to the denotation of the word "watandar" used in the Watan Act. It became necessary to refer this question to a Full Bench because the word "watandar" has received two interpretations which are inconsistent with each other in two reported decisions of this Court. These decisions are *Kadappa Bapurao v. Krishtappa* (37 Bom. L. R. 599;

A. I. R. (22) 1935 Bom. 380) and *Tarabai v. Murtacharya*, (41 Bom. L. R. 924: A. I. R. (26) 1939 Bom. 414). In his referring judgment the learned Chief Justice has examined this question and has set out reasons in support of the construction which was accepted in *Kadappa's case* (37 Bom. L. R. 599 : A. I. R. (22) 1935 Bom. 380). The question has now been argued before us and I do not think I can usefully add very much to what has been already stated by the learned Chief Justice in his referring judgment. With respect I venture to think that if the earlier decision in *Kadappa's case* (37 Bom. L. R. 599 : A. I. R. (22) 1935 Bom. 380), had been cited before the Bench that decided *Tarabai's case*, (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414), in all probability they would not have accepted the interpretation which was pressed before them by the appellant in the said case.

[8] Now, under the Watan Act, the watan properly so called consists of the watan property, if any, and the hereditary office and the rights and privileges attached to them, and "watan-dar" means a person having an hereditary interest in the watan. The question which has been referred to the Full Bench is whether the word "watandar" necessarily and always means a person who has an hereditary interest not only in the watan property, but also in the hereditary office. If the words used in defining "watandar" are strictly and literally construed, it would mean that before a person can be said to be a watandar he must have an hereditary interest both in the watan property and in the hereditary office, because it is these two that constitute the watan. But the Watan Act itself adds to the aforesaid definition of "watandar" by providing that the said word includes a person holding *watan property* acquired by him before the introduction of British Government into the locality of the watan, or legally acquired subsequent to such introduction, and a person holding such property from him by inheritance. It also includes a person adopted by an owner of a watan or part of a watan subject to the conditions specified in ss. 33 to 35. It is not disputed that before the enactment of the Watan Act in 1874 and of Regulation XVI [16] of 1827 watans were treated as ordinary property which could be divided and alienated at will. Naturally the alienation could be with regard to the office and the property or with regard to either of them. The addition made to the definition of "watandar" clearly provides that a person who may have acquired *watan property* before the introduction of British Government must be regarded as a watandar. It is significant that it is not required of such a person that he must have acquired the hereditary office along with the watan pro-

perty; it would be enough if he has acquired watan property and the acquisition of such property would make him a watandar. It would thus be clear that the inclusion of such a person in the category of watandars clearly suggests that it would be enough if the person claiming the status of a watandar is in possession not of the watan property as well as the office, but of the watan property alone. The same considerations may apply to persons who acquire watan property legally subsequent to the introduction of British rule. In their case also it is not necessary that they should have acquired both the hereditary office and the watan property before they could be called watandars under the Watan Act. In *Tarabai's case* (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414), however, it was held that a person who merely acquires watan property without acquiring the office and without being under any obligation to perform services attached to the office is not a watandar within the meaning of the Act. On the other hand, in *Kadappa's case* (37 Bom. L. R. 599: A. I. R. (22) 1935 Bom. 380) where the Court was dealing with watan property which was impartible and was governed by the rule of lineal primogeniture it was held that the family of the plaintiff and the defendants did not for that reason necessarily cease to be a joint Hindu family, and the defendants had a right by survivorship to the watan property even apart from the right of maintenance. These defendants were held to be watandars though it is clear that they could not claim to have an hereditary interest in the hereditary office itself. It seems to me that the view which was accepted in *Kadappa's case* (37 Bom. L. R. 599 : A. I. R. (22) 1935 Bom. 380) is more in consonance with the definition of the word "watandar" as explained by the additions made to it and with the scheme of the Watan Act itself.

[9] Section 5, Watan Act, prohibits alienations of watan and watan rights. Clause (a) of sub-s. (1) of S. 5 refers to the watandar in general and provides that it would not be competent to such a watandar to mortgage, charge, alienate or lease, for a period beyond the term of his natural life, any watan, or any part thereof, or interest therein, to or for the benefit of any person who is not a watandar of the same watan without the requisite sanction. If the word "watandar" is construed to mean a person having an hereditary interest in the watan property and the hereditary office, it would appear somewhat redundant to provide by cl. (b) of sub-s. (1) of S. 5 that it would not be competent to a representative watandar to alienate any right with which he is invested, as such, under this Act. It seems to me that the Watan Act contemplates only two classes of persons. One is a larger class

of persons belonging to the watan families who have an hereditary interest in the watan property as such and the other a smaller class of persons who are appointed as representative watandars and who are liable for the performance of duties connected with the office of such watandars. The rights of such officiating watandars are specially safeguarded by the provisions contained in S. 5 (1) (b) and those in Ss. 7 and 13. Now, the question as to the appointment of representative watandars is dealt with in Part 6, Watan Act. The provisions contained in the sections in this Part show that it is the duty of the Collector to determine the custom of the watan as to service and what persons should be recognized as representative watandars for the purpose of this Act. A register of the names of such representative watandars has to be maintained and they have to be assigned their respective duties. So that strictly speaking it may be somewhat difficult to predicate about persons belonging to the watan family that they have an hereditary interest in the hereditary office as such. That being so, it seems to me that it would not be correct to limit the word "watandar" only to this narrow class of persons who can claim to have an hereditary interest both in the watan property and in the hereditary office. Watan property as distinguished from property assigned to the officiator by way of his remuneration has always been treated as property belonging to the family which is capable of partition but whose alienation is governed by S. 5, Watan Act, and all persons belonging to the watan family who have an hereditary interest in such watan property are in my opinion entitled to be called watandars within the Watan Act. With respect, I may point out that that was the view which had always been accepted until *Tarabai's case*, (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414) was decided. Incidentally it may also be pointed out that the question which directly arose for decision in *Tarabai's case*, (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414) was somewhat different. But while dealing with the denotation of the word "watandar" Beaumont C. J. was disposed to take the view that there would be no point in providing special protection for watan property unless the watan property was held by a person who was also entitled to hold the hereditary office. That, however, does not appear to be strictly consistent with the provisions of the Watan Act. For instance, S. 5 (2) imposes a prohibition against alienation of watan property even though in respect of the office of the watandar a service commutation settlement has been effected, unless the right of alienating such watan without the sanction of Government is conferred upon the watandars by the terms of such

settlement or has been acquired by them under the said terms. This would clearly show that even if the watan property is held by a person who has ceased to have any interest in the office as such, it would in the absence of any special terms be still subject to the prohibition contained in S. 5 (2). It is significant that the word "watan" used in Part 1 of S. 5 (2) means only the hereditary office, while in Part 2 it means the watan property.

[10] Mr. Datar who appears in support of the view adopted in *Tarabai's case*, (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414) has invited our attention to a decision of this Court in *Chinava v. Bhimangauda*, (21 Bom. 787). This decision, however, does not seem to support the interpretation put upon the word "watandar" in *Tarabai's case*, (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414). While dealing with the phrase "persons having an hereditary interest in a watan" this is what Farran C. J. observed (p. 793) :

"The ordinary grammatical meaning of the phrase 'persons having an hereditary interest in a watan' is, we think, best observed, and the object of the Act is certainly advanced by confining it to persons having a present interest of an hereditary character in the watan. In this sense it would include all the co-sharers for the time being in the watan estate and probably also the sons of co-sharers, who, according to the principles of Hindu law, by birth acquire an interest in their father's ancestral property."

It would be clear that while interpreting the word "watan" in its context reference is made not to the hereditary office at all, but to the watan estate or property. That being so, in my opinion the answer to the question referred to the Full Bench should be that a person who acquires watan property or has hereditary interest in it without acquiring the watan office and without being under any obligation to perform the service attached to the office is a watandar within the meaning of the Watan Act, 1874. In that view it must be held that the case of *Tarabai*, (41 Bom. L. R. 924 : A. I. R. (26) 1939 Bom. 414) was not correctly decided in so far as it was there held that a person cannot be said to be a watandar unless he has an hereditary interest both in the watan property and in the hereditary office.

Chagla C. J.—I agree.

Tendolkar J.—I agree.

R.G.D. Reference answered accordingly.

A. I. A. (36) 1949 Bombay 319 [C. N. 83.]
FULL BENCH

BAVDEKAR, DIXIT AND JAHAGIRDAR JJ.

In re Jayantilal Nathubhai Parekh —
Detenu — Applicant.

Criminal Appln. No. 1006 of 1948, Decided on 22nd July 1948, from order of Dist. Magistrate, Ahmedabad, D/- 2nd April 1948.

(a) Evidence—Affidavit — Affidavit by person of matter not within his knowledge and affidavit by person on same matter within his knowledge—Latter affidavit would be accepted—Bombay Public Security Measures Act (VI [6] of 1947), S. 2—Civil P. C. (1908), O. 19, R. 1.

When there was an affidavit by the applicant that an order of detention against him under Bombay Public Security Measures Act, VI [6] of 1947 was ante-dated but it was not a matter within the knowledge of the applicant whether as a matter of fact the District Magistrate had passed on the date shown on the order, the order of detention or not, when it comes to the question as to whether the order was ante-dated or was passed on the date mentioned therein, the Court would accept the affidavit of the District Magistrate that the order was passed on the date shown in the order.

[Para 7]

(b) Criminal P. C. (1898), S. 491—Application for writ of habeas corpus—Court has to see whether detention at time of application is legal or not and not whether he was legally arrested unless detention at time of application is one in continuation of detention under illegal arrest.

Where a person is arrested illegally and imprisoned and when in imprisonment an order of detention under Bombay Public Safety Measures Act is served upon him and the detenu applies for a writ of habeas corpus, what the Court is concerned, is not whether the arrest of the applicant is legal or illegal but whether his detention under the order passed is legal or illegal. The detention of which he complains by his application is the detention in the jail on the date when he made the application, and it is immaterial for the determination of the question as to whether his prior arrest and his prior detention were or were not legal. The question under the habeas corpus Act is as to whether the detention of which the detenu complains, that means the detention at the time when he seeks to take out a writ of habeas corpus, is valid or not, which again resolves itself into the question whether at the moment there is for his detention a valid order in existence, and if there be such an order, then no writ of habeas corpus can be issued in his favour.

It is not as if in this case after an illegal order for detention was made, subsequently, because of powers conferred, an order was made continuing the original order for detention, which was in itself illegal. In such cases, where the subsequent order, even though made after the amendment conferring greater powers, continued the original order for detention which was bad, the subsequent order is also bad. [Para 9]

Annotation : — ('46-Com.) Criminal P. C., S. 491, N. 7.

(c) Bombay Public Security Measures Act (VI [6] of 1947), S. 2 — "Satisfaction" of detaining authority—Court must see whether there was subjective satisfaction—"Satisfaction" is condition precedent to valid order—Court is not concerned with grounds for satisfaction—Subjective satisfaction of mind is a state of fact — Burden to establish absence of satisfaction is on applicant under S. 491, Criminal P. C. — Burden is heavy — Burden held not discharged—Criminal P. C. (1898), S. 491.

Section 2, which permits the detention of a person says that an order for detention can be made if the Provincial Government, or where the power is delegated to its subordinate officer then the said officer is satisfied that the person who is to be detained is acting in a manner prejudicial to the public peace and the maintenance of public order or the tranquillity of the Province or any part thereof; and whenever words like "satisfaction" or "it appears" have been used in an

enactment or a regulation, the interpretation which has now been established is that the "satisfaction" is undoubtedly a condition precedent to the exercise of the powers under the section. But all the same, what the Courts have got to see, when subsequently an application is made challenging the existence of that satisfaction, is whether there was the subjective satisfaction of the authority which made the order and not whether there were grounds upon which a reasonable person could be satisfied that it was necessary to make the order; such being at times called an objective test of the satisfaction. But even though that view may be taken to have been established, the satisfaction of the mind is just as much a state of fact as for example, the state of digestion, of the person who makes the order, and consequently if anyone challenges that the authority which made the order had not the state of mind which could be described as a state of "satisfaction" it is open to the Court to say that it must be satisfied as to the state of the mind of the person who made the order and to take evidence as to the existence of the state of mind. But, all the same, even though it is open to the Court when the bona fides of the authority which made the order are challenged to take evidence with regard to the state of the mind, one must not approach the order, the validity of which is challenged, with prejudice which may possibly have been derived from past experience. [Para 10]

The burden is upon the person who challenges the bona fides of the officer to show that as a matter of fact the order whatever the officer might have stated in it with regard to his satisfaction, was passed without such satisfaction. Such burden must, owing to the fact that the detenu cannot possibly know of the evidence upon which action has been taken against him, lie very heavily upon him. But that does not affect the fact that the burden is upon him and he must discharge that burden, which is heavy, by leading evidence. [Para 11]

The state of mind of a person who makes an order is pre-eminently a fact within his own knowledge; and where upon this fact the District Magistrate says that as a matter of fact there was material before him upon which he was satisfied in effect that the applicant was inciting agricultural labourers to resort to violence against landlords and that he was also inciting his associates or followers to form an unlawful army, and the successor District Magistrate who supplied the grounds from the papers left by the previous District Magistrate says that he found from these papers materials which would show that the applicant was acting in a manner prejudicial to the public safety and the maintenance of public order, the mere fact that the applicant has filed his own affidavit saying that there were no agricultural labourers in Ahmedabad where applicant was charged with acting prejudicially to public peace, and saying also that he has no followers or associates, is not enough to discharge the heavy burden to show that the order was passed mala fide or with an ulterior motive. [Para 11]

In the absence of evidence there is no reason, however, in spite of the character of the City of Ahmedabad, to suppose that there are no agricultural labourers in the City of Ahmedabad. Similarly it is difficult to believe that the applicant who is the secretary of the Kisan Sabha, and works in the headquarters at Ahmedabad, has no associates, though not as thick as a friend. [Para 12]

No question of the order being bad because there were no agricultural labourers in Ahmedabad can possibly arise, because the only condition precedent which has been laid down for the validity of the order is the satisfaction of the District Magistrate, and if the District Magistrate was satisfied, then the order cannot be challenged subsequently on the ground that the evidence

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upon which it was based was false. The Court is only concerned with the question as to whether the District Magistrate was satisfied. The question may involve in a suitable case an investigation whether sufficient care was or was not exercised, but it is not open to the Court to sit in appeal over an order which has been passed by a District Magistrate, much less it is open to it to consider if circumstances are made out before it in which it would have passed the order or take evidence as to the conclusion of the fact found by the District Magistrate : (1948) Cr. Appeal No. 920 of 1948 decided on 15-6-48 and (1948) Cr. Appeal No. 848 of 1948 decided on 7-6-48, *Expl.*; 1941-2 All E. R. 665; (1942) A. C. 206 and A. I. R. (35) 1948 Bom. 334 (F.B.), *Rel. on.*

[Para 24]

Annotation: ('46-Com.) Criminal P. C., S. 491, N. 7.

(d) Bombay Public Security Measures Act (VI [6] of 1947), S. 2—Question of application of mind by detaining authority is really question of its satisfaction—Affidavit by authority that it applied its mind to the question supported by affidavit by successor authority—Authority held applied its mind.

[Para 14]

(e) Bombay Public Security Measures Act (VI [6] of 1947), S. 3—Supplying grounds and other particulars for detention—Withholding of facts and details, when renders detention bad, indicated—Giving of conclusion of facts and such particulars as are in opinion of detaining authority, sufficient to enable detenu to make representation—There is compliance with S. 3—Tests of compliance indicated—Court cannot enter into sufficiency of particulars supplied.

Even though the Bombay Public Security Measures Act uses the words grounds and particulars, except perhaps that the grounds are more general in their character and the particulars by their very nature would have to be particular, there is not much difference. It has, therefore, been held that it is not sufficient compliance with S. 3 that there should be in the grounds which have been furnished to the detenu a reproduction of the words of the section like "You are acting in a manner prejudicial to the public safety and the maintenance of public order". The use of the word "other" shows that the grounds should also include particulars which the Legislature thought the detenu should have in order that he should be able to make a representation to the proper authority, and consequently the grounds have to be something more than the mere reproduction of the words of the section. The particulars have to be supplied, but only those particulars may be supplied which are in opinion of the detaining authority, sufficient to enable the detenu to make a representation. The only compulsion is that the grounds must be disclosed. As one of the objects of supplying the detenu the grounds is that he should be able to make a representation to the detaining authority, the grounds must tell him something. If they do not tell the detenu anything at all, then the requirements of S. 3 are not complied with and the detenu would be entitled to be released. If on the other hand, a paper is served on the detenu which says that you have been detained upon the following grounds and thereafter mentions nothing or puts in crosses, there has been omission to supply the grounds. It is not a satisfactory test whether the withholding of facts or withholding of details has or has not made it difficult for the detenu to make his defence: (1942) A. C. 206 and (1942) A. C. 284, *Considered.*

[Para 15]

If the detaining authority gives to the detenu its conclusions of fact and such particulars as are in its opinion sufficient to make representation and it could

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be said from the grounds which are given and the particulars which are furnished that the order for the detention of the detenu could reasonably be made, then there has been compliance with the mandatory provisions of S. 3. But this is not as a matter of fact a necessary test. But there must be a disclosure to the detenu of the conclusions of fact of the detaining authority, and if the grounds together with such particulars as are furnished are sufficient to show to the Court that the detaining authority could reasonably have come to the conclusion that the detenu was acting in a manner prejudicial either to the public peace or the maintenance of public order or the tranquillity of the area in respect of which the order has been made, then the grounds cannot be said to be bad.

[Para 16]

It may happen that the applicant may be handicapped to this extent that in any representation which he may make he may be restricted to denying the allegations and relying on, what may be called, evidence of good character. But then the Act contemplates that that may sometimes happen. When particulars as distinct from grounds are to be given, the only requirement which the section contemplates is that the particulars should be, in the opinion of the detaining authority, sufficient to enable the detenu to make a representation. Whenever the words "in their opinion" are used, that means if subsequently a point as to their sufficiency is raised before the Court, the Court must decline to go into that question. Though fetish should not be made of what may be called the grounds of public interest inasmuch as it is ultimately left to the discretion of the detaining authority to supply such particulars and grounds as are in the opinion of the detaining authority sufficient to enable the detenu to make a representation, it is not possible to subject the particulars to any objective test of sufficiency: 1942 A. C. 206, *Ref.*

[Para 17]

(f) Bombay Public Security Measures Act (VI [6] of 1947), S. 3—Order of detention by District Magistrate under delegated powers—Detenu must be informed that he is entitled to make representation against order to Provincial Government—Merely saying that he has right to make representation to District Magistrate is not compliance with mandatory provisions of S. 3—But defect does not invalidate grounds or particulars supplied.

Neither S. 3 nor S. 21 provides that where the powers and duties imposed upon Government are in pursuance of S. 21 delegated to an officer, the right which the detenu had of making representation would be to make a representation, not to the Provincial Government, but to such officer. It is not as if the delegation which has been effected deprives the Provincial Government of its powers. Notwithstanding any delegation the detenu is given a right to make a representation to the Provincial Government. When construing the section Courts are not entitled to read for the words "Provincial Government" the words "District Magistrate or such detaining authority as has issued the order" wherever the words occur. Where the order merely mentions that the detenu is entitled to make representation against the order and that he should address it to the District Magistrate, there is a failure to tell that the detenu has a right to make a representation to the Provincial Government, and there is no compliance with the mandatory provisions of S. 3. In such a case, there is a defect in the procedure.

[Paras 18 and 19]

But this defect in procedure would not invalidate the statement of grounds and particulars furnished by the detaining authority to the detenu.

[Para 22]

(g) Interpretation of Statutes—Government delegating authority but subsequently exercising it

—Authority to whom powers are delegated ceases to have jurisdiction. [Para 19]

L. M. Jhaveri and S. A. Neemuchwala

— for Applicant.

S. G. Patwardhan, Government Pleader

— for the Crown.

Bavdekar J.—This is an application under the provisions of S. 491, Criminal P. C., for release from detention of the applicant who, now it appears from the return which has been made, is detained by an order passed by the District Magistrate of Ahmedabad bearing the date 2nd April 1948, for his detention. It was the case of the applicant that he was actually arrested in the district of Surat on 30th April 1948, without a warrant and without any copy of any detention order being served upon him, and that a copy of the order, which it is now contended authorized the detention, was given to him only on 3rd May 1948. He said that consequently, in the first instance, his arrest was illegal, and secondly, that his detention under the order was also illegal, because, even though the order bore the date 2nd April 1948, when it was served upon him, it was an ante-dated order which had not been passed on 2nd April 1948. There were other grounds upon which he said that the order was bad; but it will be more convenient to mention them a little later.

[2] The order in this case purports to be passed under S. 2, Bombay Public Security Measures Act (Bom. VI [6] of 1947). Section 2, sub-s. (1), cl. (a) of which enables the Provincial Government, if it is satisfied that any person is acting in a manner prejudicial to the public safety, the maintenance of public order, or the tranquillity of the Province or any part thereof, to make an order directing that he be detained. Section 21 of the same Act then provides that :

"The Provincial Government may by an order direct that any power or duty, which is conferred or imposed on the Provincial Government, shall in such circumstances and under such conditions, if any, as may be specified in the order, be exercised or discharged by any officer or authority subordinate to it, not lower in rank than a Deputy Commissioner of Police in Greater Bombay, or the District Magistrate, or Additional District Magistrate elsewhere."

It appears that under a notification to which reference will be made later the powers of the Provincial Government under S. 2 have been delegated to the District Magistrate of Ahmedabad; and the District Magistrate purports to make this order under S. 2, because of the powers so delegated to him.

[3] Now, where an order is made under S. 2, sub-s. (1), S. 3 of the same Act requires that the Provincial Government should, as soon as may be, communicate to the person affected by the order the grounds on which the order has been

made, without disclosing facts which it considers against the public interest to disclose and also furnish him with such particulars as are in its opinion sufficient to enable him to make a representation to the Provincial Government against the order. The applicant mentions in his application that in accordance with the provisions of this section the District Magistrate, who is again in pursuance of the same notification burdened with the responsibility under S. 3, furnished him with the grounds of his detention and such particulars as were in his opinion sufficient to enable him to make a representation, and all that those grounds and particulars stated was that the applicant was acting in a manner prejudicial to the public safety and the maintenance of public order, that he was inciting agricultural labourers to resort to violence against landlords and that he was inciting his associates and followers to form an unlawful army.

[4] It was contended on behalf of the applicant in his application that, in the first instance, this order was a mala fide order passed by the District Magistrate. It was passed not because the District Magistrate was satisfied as required by S. 2, sub-s. (1), that the applicant was acting in a manner prejudicial either to the public safety or the maintenance of public order or the tranquillity of the city of Ahmedabad as the order mentioned, but in order to prevent the applicant, who is the Secretary of the Kisan Sabha of Ahmedabad, from carrying on the legitimate activities of that Sabha and also of the Communist Party of India of which the applicant is a member. It stated, in the second instance, that the applicant was not inciting agricultural labourers to resort to violence against landlords and he was also not inciting his associates and followers to form unlawful armies, because there were no agricultural labourers in Ahmedabad and the applicant has not got any followers or associates. The applicant is the Secretary of the Kisan Sabha of Ahmedabad, but the applicant said, nevertheless, that people who were members of the Sabha were not his followers, and that the Kisan Sabha had not a single member in the city of Ahmedabad. The applicant said, therefore, that what the District Magistrate stated in his order could not possibly be true. Thirdly, the applicant contended that the grounds which were given to him were vague grounds, and the communication which the District Magistrate made to him was consequently bad for two reasons. In the first instance, the applicant did not know what representation he was to make because of the vagueness of the grounds and the particulars which were supplied to him. In the second in-

stance, the only safeguard which has been provided for the liberty of a subject under the Public Security Measures Act, 1947, is that mentioned in S. 3, which requires the Provincial Government, or in case the powers in respect of any particular area are delegated to the District Magistrate, the District Magistrate, to communicate to the person detained the grounds on which the order had been made and such other particulars as are in his opinion sufficient to enable the detenu to make a representation to the Provincial Government. It is said that the District Magistrate acted in contravention of S. 3 when, instead of furnishing proper grounds when the applicant applied for them, he furnished, what may be called, vague grounds. There was, therefore, failure to comply with the mandatory provisions of S. 3 and consequently the detention was bad.

[5] Then there is made before us, what may be called, a subsidiary point and that is that S. 3, Bombay Public Security Measures Act, 1947, requires the Provincial Government, or when the liability for communicating under S. 3 was laid upon the District Magistrate, the District Magistrate, to inform the detenu not only with regard to the grounds and particulars but also with regard to a right which the detenu had, namely, to make a representation to the Provincial Government against the order. The applicant pointed out that the grounds which were furnished to him did not specifically tell him that he had a right to make a representation to the Provincial Government against the order. It was said that consequently there was another failure in regard to the mandatory provisions laid down in S. 3 and the order of detention was consequently bad.

[6] Now inasmuch as the applicant challenged the bona fides of the District Magistrate who passed the order for detention, we have had placed before us in this case affidavits filed by two persons holding at different times the charge of the post of the District Magistrate of Ahmedabad. The first is the affidavit of Mr. Modi, who was the District Magistrate at the time when the order for detention purports to have been made. He said in his affidavit that it was not true that the order was ante-dated, it was not true that it was passed *mala fide*, it was also not true that the order was passed without applying his mind to the question as to whether there were before him sufficient grounds for satisfying himself that the applicant was acting in a manner prejudicial to the public safety or the maintenance of public order in the city of Ahmedabad. There was, however, no counter affidavit filed, either by Mr. Modi or by the subsequent District Magistrate, Mr. Damry or any one else, that

there were agricultural labourers in the city of Ahmedabad, nor was there any affidavit filed that the applicant as a matter of fact had followers and associates. The subsequent affidavit of Mr. Damry was that he supplied the grounds upon which the applicant was detained to the applicant from the papers which were with him in the record of the order for detention passed against the applicant; and he said that he could say from those papers that there were grounds before the then District Magistrate upon which to come to the conclusion that the applicant was acting in a manner prejudicial to the public safety and the maintenance of public order in the city of Ahmedabad.

[7] Now, it is quite true that the applicant in this case was arrested in the District of Surat on 30th April 1948, without a warrant. It is the case of the Crown that the applicant was arrested under the order, which he admits was served upon him on 3rd May 1948, in the Sabarmati Jail where he was detained. The applicant contested by his application that as a matter of fact he was arrested in pursuance of the order dated 2nd April 1948. It was his case that this order was not in existence at the time of his arrest but an ante-dated order bearing date 2nd April 1948, was subsequently fabricated. We have in this case affidavits of both Mr. Modi, who was the then District Magistrate of Ahmedabad, and his successor Mr. Damry, who says that Mr. Modi did as a matter of fact pass, i. e., he found an order in the papers bearing the date 2nd April 1948, the order under which the applicant is being detained. It was not a matter within the knowledge of the applicant whether as a matter of fact the District Magistrate had passed on 2nd April 1948, the order of detention against him or not. It is obvious, therefore, that when it comes to the question as to whether the order was ante-dated or was passed on 2nd April 1948, we must accept the affidavits which have been filed before us by Mr. Modi and by Mr. Damry that he found in the papers which were before him the order of 2nd April 1948, directing that the detention of the applicant should be made against which there is nothing except an affidavit of the applicant not based upon knowledge. In our view, therefore, there is no substance in the contention of the applicant that his detention was under an order which was ante-dated.

[8] The learned counsel who appears on behalf of the applicant has raised the contention that, assuming that the order was passed on 2nd April 1948, the applicant could not be arrested in the District of Surat, which was an area over which the District Magistrate of Ahmedabad has got no magisterial jurisdiction. He points out that, even though the powers of the Provincial

Government under S. 3, Bombay Public Security Measures Act, 1947, have been delegated to the District Magistrates, the District Magistrates are not empowered to exercise the powers delegated to them over the whole of the Province of Bombay. The order which the Government of the Province of Bombay have passed is as follows:

"In exercise of the powers conferred by S. 21, Bombay Public Security Measures Act, 1947 (Bombay Act (VI [6] of 1947), the Government of Bombay is pleased to direct that the powers conferred and duties imposed on it by sub-ss. (1), (2) and (4) of S. 2 and by Ss. 3 and 4 of the said Act shall also be exercised and discharged within their respective jurisdictions by the Commissioner of Police, Bombay, in Greater Bombay and District Magistrates and the Additional District Magistrates elsewhere."

So the powers of the District Magistrate of Ahmedabad were confined to his jurisdiction, that is, to the area comprised in the revenue district of Ahmedabad. It is contended therefore that, even if the order which was passed was on account of the satisfaction in the mind of the District Magistrate that the applicant was acting in a manner prejudicial to the public safety and the maintenance of public order in the City of Ahmedabad, it could not be executed outside the district of Ahmedabad, and if that is so, the arrest of the applicant was illegal; and it is said consequently that his subsequent detention under the order, though it may be within the district of Ahmedabad, is also illegal.

[9] Now, it is quite true that under the Bombay Act VI [6] of 1947, as it originally was and the delegation of the powers under the notification which has been reproduced above, the District Magistrates would have power to make orders only in regard to the public safety or the maintenance of public order or the tranquillity of the areas which are within their jurisdiction, and they would also have power to direct detention in a jail again within that jurisdiction. We are told that there have been amendments made subsequently empowering the detention elsewhere. But with that we are not concerned in the present case; and it is arguable therefore that, if an order is made under S. 2 by a District Magistrate, the person who it is intended to be detained could be arrested within the jurisdiction of the District Magistrate and nowhere else. But what we are concerned with in this case is not whether the arrest of the applicant was legal or illegal but whether his detention under the order passed is legal or illegal. The detention of which he complains by his application was the detention in the Sabarmati Jail of Ahmedabad on the date when he made the application, that is on 3rd June 1948, and it appears to us that it is immaterial for the determination of the question before us as to whether his prior arrest and his

prior detention were or were not legal. It is not as if in this case after an illegal order for detention was made subsequently because of powers conferred an order was made continuing the original order for detention, which was in itself illegal. In such cases the view that has prevailed in this Court is that where the subsequent order, even though made after the amendment conferring greater powers, continued the original order for detention which was bad, the subsequent order is also bad. But that is not what we are concerned with in the present case. It may frequently happen that even though a person is detained originally under an invalid order, subsequently a valid order for detention happens to be made in his regard. Even if the detenu is under detention at the time when the subsequent order is made, the fresh order of detention has to be served upon him, and when subsequently the jailor is called upon to justify the detention by the detenu, it is sufficient if he points out to a valid order when the return is made in order to give him a complete answer to the charge that he is detaining at the time without lawful authority the detenu in question. The question under the Habeas Corpus Act is as to whether the detention of which the detenu complains, that means the detention at the time when he seeks to take out a writ of *habeas corpus*, is valid or not, which again resolves itself into the question whether at the moment there is for his detention a valid order in existence, and if there be such an order, then no writ of *habeas corpus* can be issued in his favour.

[10] That brings to us, what may be called, the principal contentions which have been raised on behalf of the applicant. The first is the contention that the order which was passed was mala fide; not, indeed, because the District Magistrate had any grudge against the applicant but the order was not passed in order to safeguard the public safety or the tranquillity in the city of Ahmedabad; it was passed with an ulterior motive to prevent the applicant from carrying on, what may be described as the lawful activities of the Kisan Sabha and the Communist Party, which the applicant says, have not been declared unlawful organizations. Now the section which permits the detention of the applicant says that an order for detention could be made if the Provincial Government, or where the power is delegated to its subordinate officer then the said officer, is satisfied that the person who is to be detained is acting in a manner prejudicial to the public peace and the maintenance of public order or the tranquillity of the Province or any part thereof; and whenever words like "satisfaction" or "it appears" have been used in an enactment or a regulation, the interpreta-

tion which has now been established is that the "satisfaction" is undoubtedly a condition precedent to the exercise of powers under the section. But all the same, what the Courts have got to see, when subsequently an application is made challenging the existence of that satisfaction, is whether there was the subjective satisfaction of the authority which made the order and not whether there were grounds upon which a reasonable person could be satisfied that it was necessary to make the order; such being at times called an objective test of the satisfaction. But even though that view may be taken to have been established, as it has been pointed out frequently, the satisfaction of the mind is just as much a state of fact as, for example, the state of digestion, of the person who makes the order, and consequently if any one challenges that the authority which made the order had not the state of mind which could be described as a state of "satisfaction", it is open to the Court to say that it must be satisfied as to the state of the mind of the person who made the order and to take evidence as to the existence of the state of mind. But all the same, even though it is open to the Court when the *bona fides* of the authority which made the order are challenged to take evidence with regard to the state of the mind, one must not approach the order, the validity of which is challenged, with prejudice which may possibly have been derived from past experience.

[11] It has been pointed out to us that in the past orders have frequently been made which have been found to be careless. It has been found at times that an order is made without the application of the mind of the authority which made the order, and sometimes as a matter of fact even with an ulterior motive, that is, not in order to safeguard the public safety or the maintenance of public order or the tranquillity of the area in whose interest the order is made, but in order to achieve some other object which was not within the purview of the Act. That is regrettable; but all the same when an officer, whom the Legislature obviously regards as responsible because it thought that it would be safe if the powers of the Provincial Government were delegated to him under S. 21, makes the order, the burden is upon the person who challenges the *bona fides* of the officer to show that as a matter of fact whatever the officer might have stated in his order with regard to his satisfaction, the order as a matter of fact was passed without such satisfaction. We have no doubt that such burden must, owing to the fact that the detenu cannot possibly know of the evidence upon which action has been taken against him, lie very heavily upon him. But that does not affect the

fact that the burden is upon him and he must discharge that burden, which is heavy, by leading evidence. Now all that the applicant did in this case when he proceeded to discharge the onus which was upon him to show that the District Magistrate was acting *mala fide* was, apart from the assertions of such *mala fides*, to file his own affidavit upon two facts; firstly, that there were no agricultural labourers in the city of Ahmedabad, and secondly, that he as a matter of fact had no followers and associates; and the learned counsel who appears on his behalf points out to us that, even though he filed an affidavit on these two points, there never has been any counter affidavit on behalf of the District Magistrate. Now it is quite true that in the affidavits which have been filed on behalf of the District Magistrate there is no mention of the existence of agricultural labourers in Ahmedabad or of the fact that as a matter of fact the applicant has friends and followers or associates; and we do not see why, if the original order is in the opinion of the authority who issued it a valid order, valid that is because whatever the applicant might have said, the detaining authority even now finds that it was a good order, the applicant having incited the agricultural labourers and having as a matter of fact incited his followers or associates in the manner mentioned in the grounds, no affidavits should have been filed on behalf of the District Magistrate to controvert the allegations made in the application and the affidavit of the applicant. But it is not as if in this case no affidavit has been filed on behalf of the District Magistrate. Affidavits have been filed both by the District Magistrate who made the order and the District Magistrate who subsequently furnished the grounds. The state of mind of a person who makes an order is pre-eminently a fact within his own knowledge; and upon this fact the District Magistrate says that as a matter of fact there was material before him upon which he was satisfied in effect that the applicant was inciting agricultural labourers to resort to violence against landlords, and that he was also inciting his associates or followers to form an unlawful army. But the matter does not even rest there. The grounds in this case were subsequently furnished by the District Magistrate who succeeded the Magistrate who made the order. The grounds obviously were furnished from the papers which had been left by the previous District Magistrate, and even that District Magistrate says that he found from those papers that there were before the District Magistrate who made the order, materials which would show that the applicant was acting in a manner prejudicial to the public safety and the maintenance of public order. In our view, there.

fore, the mere fact that the applicant has filed his own affidavit saying that there were no agricultural labourers in Ahmedabad and saying also that he has no followers or associates is not enough to discharge the heavy burden upon him that the order was passed *mala fide* or with an ulterior motive.

[12] Some argument has been addressed to us with regard to Ahmedabad being an industrial town with the result that there are no lands within the municipal area of the city of Ahmedabad which may be used for agricultural purposes; and the learned counsel who appears on behalf of the applicant says that looking to the nature of the town of Ahmedabad which is an industrial town people will find it extremely difficult to keep their lands in use for agricultural purposes when there must have been great demand for sites for building and that we should have no difficulty whatsoever in accepting the affidavit which has been filed on behalf of the applicant that there are no agricultural labourers in the city of Ahmedabad as true. We see no reason, however, in spite of the character of the city of Ahmedabad, to suppose that there are no agricultural labourers in the city of Ahmedabad. It is possible that the city of Ahmedabad which formerly probably occupied a smaller area, has now grown up to a very large extent. We think it is possible that it has grown to such an extent that it may not be possible to find a single field within the radius of 7 or 8 miles from the centre of the town. We have no evidence upon the point, but we will assume for the purposes of argument that that is true. It is not contended, however, that there are no fields beyond this radius. It would be very difficult for a man living in the centre of the town to travel to his land each day over a distance of 7 or 8 miles. We can even understand that there could not be a large number of agricultural labourers living in the heart of Ahmedabad. But we cannot understand why on the fringe of the town of Ahmedabad there should not be living people who cultivate the lands which are outside; and, as we cannot understand that, we are not prepared to say that the applicant has discharged his burden by simply saying on affidavit that there were no agricultural labourers in the town of Ahmedabad whatever the District Magistrate's order may have said; and when it comes to the question of the followers and associates, one can see very easily the danger of relying in such matters upon the uncorroborated affidavit of a person who is after all interested in securing that he will escape detention if he could possibly do so. The applicant in this case says that he has no followers. The applicant is the Secretary of the Kisan Sabha. It is

not in dispute that as a matter of fact the Kisan Sabha has got a large number of members. But even so, it is contended that the applicant has no followers for the reason, in the first instance, that the Kisan Sabha has not got any member in the town of Ahmedabad. It has got to be seen, however, that the affidavit which the applicant has filed does not say that he has no followers or associates in the town of Ahmedabad. In the second instance, it is contended that, even though there may be members of the Kisan Sabha outside, they are not followers of the applicant, they are the followers of the leaders of the Kisan Sabha of all India. We shall presume for the purposes of argument that this is a correct statement. But all the same it is very difficult to believe that the applicant not only has no followers but that he has not even associates. The Kisan Sabha of which the applicant is the Secretary has admittedly got its headquarters in the city of Ahmedabad. He works there; an associate is a person with whom one associates. He is not as thick with the associate as friends generally are. But all the same all that is necessary is that he should have associated with other persons, and it seems to us difficult to believe that the applicant does not associate with other persons in the Ahmedabad city where he works.

[13] In our view neither this statement nor anything which has been pointed out on behalf of the applicant by his learned counsel is sufficient to show that the District Magistrate had not got the state of mind which it is necessary he should have before he makes an order under S. 2 of the Act. This, of course, has no reference to the other contention which has been made before us; and that is, that the District Magistrate has not applied his mind to the question, and that the grounds which have been supplied are vague and consequently there has been a breach of the mandatory provisions of S. 3 of Act VI [8] of 1947.

[14] Taking up now the first contention with regard to the application of the mind, though in part it may be taken to be really a question of the District Magistrate's satisfaction, here again we have the affidavit of Mr. Modi that he had applied his mind to the question on the materials which were supplied to him, and that he came to the conclusion that the applicant was acting in a manner prejudicial to the public safety and the maintenance of public order in the city of Ahmedabad, and it is corroborated by the affidavit of Mr. Damry who supplied the grounds from the papers which were left and who says that the papers disclose grounds upon which Mr. Modi could be satisfied. He could not say anything further, because the satisfaction was not his. But if the affidavits of these two persons are accepted,

there can be no doubt that the District Magistrate applied his mind to the case before he made the order of 2nd April 1948.

[15] Coming next to the question as to whether the grounds are vague, and whether consequently the applicant is entitled to be released from detention, what s. 3, Public Security Measures Act, requires is that when an order for detention of a person is made, the Provincial Government or a District Magistrate, if he is authorised in that behalf, should supply to the detenu the grounds on which the order has been made but without disclosing the facts which it considers against the public interest to disclose, and, secondly, such other particulars as are in its opinion sufficient to enable him to make a representation. The section speaks of two things, grounds and particulars, and has been modelled to some extent on Regulation 18B of the Defence (General) Regulations, 1939, of England. But there is this difference between the wording of that Regulation and the Bombay Public Security Measures Act. Leaving aside for the moment that the grounds are to be furnished by the Home Secretary who makes the order under the statute, sub-s. (5) of Regulation 18B says :

"It shall be the duty of the Chairman to inform the objector of the grounds on which the order has been made against him and to furnish him with such particulars as are in the opinion of the Chairman sufficient to enable him to present his case."

The first part, that is the grounds on which the order has been made against him, is the same. But whereas the Act specifically mentions that the authority which makes the order is entitled to keep back from the detenu such facts as it is not in the interest of the public to divulge, the Regulation leaves that thing to be done under the provisions of the ordinary law. This is quite clear from the discussion which will be found upon this point in the case of *Liversidge v. Sir John Anderson*, (1942) A. C. 206 : (1941-3 ALL E. R. 338). The second point of difference is that, whereas the Regulation says that the Chairman was to supply the detenu, besides the grounds, with such particulars as are, in the opinion of the Chairman, sufficient to enable him to present his case, the Act puts in a word between "such" and "particulars", namely, the "other." Now what sort of ground it has been considered sufficient for the detaining authority to supply under the Regulations may be found again at p. 240 of the report of *Liversidge's case*, (1942) A. C. 206 : (1941-3 ALL E. R. 338). The grounds which were supplied to Benjamin Greene who was detained under the Regulations are as follows :

"Home Office, Advisory Committee, 6 Burlington Gardens, W. I., Reasons for order under Defence Regulation 18B in the case of Benjamin Greene. The order

under Defence Regulation 18B was made against you for the following reasons. The Secretary of State has reasonable cause to believe that you have been recently concerned in acts prejudicial to the public safety and the defence of the realm and in the preparation and instigation of such acts and that it is necessary to exercise control over you."

Then follow what are called particulars. It does not appear from the report of the *Liversidge's case*, (1942) A. C. 206 : (1941-3 ALL E. R. 338) or the case of *Greene v. Secretary of State for Home Affairs*, (1942) A. C. 284 : (111 L. J. K. B. 24) that there was any challenge that the grounds which were furnished in that case were not such grounds as were intended by sub-s. (5) of Regulation 18B, and it may therefore be taken that the grounds as a matter of fact were valid grounds for the Chairman to supply to the detenu. One feature which may then be noticed is that as a matter of fact beyond telling the applicant as to which of the clauses of the section under which the order was made the grounds do not disclose anything at all to the detenu. It is true that after mentioning that he has been recently concerned in acts prejudicial to the public safety and the defence of the realm, it goes on to say that he was also concerned with the preparation of such acts, but that does not afford any more illumination of the facts upon which the conclusion was based. It seems to have been taken therefore as sufficient compliance with sub-s. (5) of the Regulation that the detenu was told as to grounds, the particular clause of the section under which the action was being taken. It is just as well to remember that under the English Regulation action could be taken against the detenu owing to several grounds, for example, that he was a person of hostile origin, secondly, upon the ground that he was concerned in an act prejudicial to the public safety and so on, and it seems to us evident that if the detenu was told which of those things the Secretary of State was satisfied about, that was regarded as sufficient compliance. But so far as the Bombay Public Security Measures Act is concerned, this interpretation has not been acceptable to any of the Courts, and the reason for that seems to be the word "other" which has been introduced between "such" and "particulars". It has been pointed out before now that even though the Bombay Public Security Measures Act uses the words grounds and particulars, except perhaps that the grounds are more general in their character and the particulars by their very nature would have to be particular, there is not much difference. It has, therefore, been held that it is not sufficient compliance with s. 3, Bombay Public Security Measures Act, that there should be in the grounds which have been furnished to the detenu a reproduction of

the words of the section like "you are acting in a manner prejudicial to the public safety and the maintenance of public order". The use of the word "other" shows that the grounds should also include particulars which the Legislature thought the detenu should have in order that he should be able to make a representation to the proper authority, and consequently the grounds have to be something more than the mere reproduction of the words of the section. There has been considerable discussion before us as in other cases as to what sort of grounds it would be sufficient and necessary for the detaining authority to supply; and questions have been raised whether the grounds should or should not be vague, whether the grounds should or should not be precise. Two sorts of arguments were advanced before us. It was contended that the grounds are supplied for two reasons, firstly, in order that the detenu may have a sufficient opportunity to make his representation, sufficient that is not only in duration of time but sufficient because of his having been apprised of what was found against him and, secondly, because they should be a safeguard against the abuse of power. The particulars have to be supplied, but only those particulars may be supplied which are in the opinion of the detaining authority sufficient to enable the detenu to make a representation. The only compulsion is that the grounds must be disclosed. This is, therefore, the only safeguard in regard to the liberty of the subject and consequently the grounds must be precise, and they must not be vague. Now, one can understand an argument that as one of the objects of supplying the detenu the grounds is that he should be able to make a representation to the detaining authority, the grounds must tell him something. If they do not tell the detenu anything at all, then the requirements of S. 3 are not complied with. If, for example, in spite of the duty laid upon the detaining authority no grounds whatsoever were supplied under S. 3, then that could not be compliance with the provisions of S. 3, and the detenu would be entitled to be released. If, on the other hand, a paper is served upon the detenu which says that you have been detained upon the following grounds and thereafter mentions nothing or puts in crosses, there has been omission to supply the grounds. But the learned counsel who appears on behalf of the applicant wants us to go much further than this. We do not wish to say that immediately we go beyond this there has been compliance of the section. But the extent to which the learned counsel wants us to go is this. He says :

"In case I am given certain grounds but at the same time I am not given grounds in such detail that it is impossible for me to make any other defence than that

I am not innocent then there is failure to comply with the provisions of S. 3."

Now, the grounds may become insufficiently precise for various reasons. Some of the reasons one can find in the Act itself. It says that even though there is the duty upon the detaining authority to supply the grounds to the detenu, the detaining authority may not at the same time disclose facts which it considers against the public interest to disclose. Even if the Act is not to be read as if there was prohibition against disclosing facts, the discretion to disclose facts may have by its exercise rendered the grounds vague. In the second instance, the section when saying that particulars should be given says that such particulars should be given as are in the opinion of the detaining authority sufficient to enable the detenu to make a representation. Now, it is obvious that if the section itself contemplated that certain things may be omitted then if it could be said that the grounds are not as precise as they might have been because of such omission, then there would not be an adequate ground for releasing the detenu. It is true that when the detaining authority furnishes the grounds to the detenu, it must, besides stating under which clause action has been taken, also give, what may be called, the conclusions of fact upon which the satisfaction of its mind as mentioned in the section is derived. Suppose the conclusion of fact to which it has arrived is that the detenu has at a specified time and at a specified place made a speech in which he incited the audience to form, what may be called, a private army; if subsequently the detaining authority thought that it would be against the public interest to disclose either time or place it can be said that the ground is not as precise as it should be. It would be possible to characterise the ground to that extent as a vague ground. And the grounds will be more vague as more particulars are dropped. If the grounds were to give the names of every one in the audience, it would be a more precise ground. If it gave no names at all but merely said that the persons were members of a particular body, it will be less precise and immediately any such particulars are dropped from the grounds we could conceive of the detenu being handicapped in making his representation. If, for example, the detenu were told that he at a particular time and place made a speech upon which the conclusion of fact of the District Magistrate was based, he may be able to give proof that at that time and place he was elsewhere and one can conceive of cases in which he is deprived of an opportunity of adducing before the District Magistrate a complete proof of his innocence if the time and place are dropped, and if we are to

accept as a test in determining whether the grounds which are to be supplied to the detenu are or are not sufficient for the purpose of S. 3 whether the detenu is handicapped in making the representation then that part of the section which provides for the keeping back of facts which it is necessary in the public interest not to disclose may be rendered nugatory. We do not think, therefore, that it is a satisfactory test whether the withholding of facts or withholding of details has or has not made it difficult for the detenu to make his defence.

[16] Coming next to the second contention which has been urged as to why the grounds should be precise, that that is the only safeguard which has been provided to the detenu, one can easily understand that, if an Act provides that the grounds must be supplied to the detenu, though it may be after the detention order is made, the detaining authority has of necessity to be careful. The grounds would undoubtedly go into the possession of the detenu; the detenu may take up the matter to Court. The fact that the grounds have to be mentioned would undoubtedly constitute a check upon the detaining authority. But all the same it does not appear to us that the fact that one possible object of the Legislature in providing that the grounds should be given to the detenu after detention was to keep a check upon any carelessness or otherwise is not determinative of the nature of the grounds which can be called adequate for the purpose of the section. We do not wish to do what the Legislature has apparently deliberately not done, that is, qualified the words grounds or particulars by an adjective like precise. But what we think would be a sufficient test in such cases is this. If the detaining authority gives to the detenu its conclusions of fact and such particulars as are in its opinion sufficient to make a representation and it could be said from the grounds which are given and the particulars which are furnished that the order for the detention of the detenu could reasonably be made, then there has been compliance with the mandatory provisions of S. 3 of the Act. We do not wish to say that this is as a matter of fact a necessary test. But there must be a disclosure to the detenu of the conclusions of fact of the detaining authority, and if the grounds together with such particulars as are furnished are sufficient to show to the Court that the detaining authority could reasonably have come to the conclusion that the detenu was acting in a manner prejudicial either to the public peace or the maintenance of public order or the tranquillity of the area in respect of which the order has been made, then the grounds cannot be said to be bad.

[17] Now what the grounds said in this case

to the applicant was that he had incited agricultural labourers to resort to violence against landlords. He had also incited his associates and followers to form an unlawful army, by which we understand a private army. No other particulars have been given as to whether he incited agricultural labourers by addressing them at a meeting or by writing letters. Similarly there are no details furnished as to the time and place or the manner in which the associates and followers of the applicant were incited to form an unlawful army. But all the same if we start with a presumption, as we must, that the District Magistrate came to the conclusion that the applicant has done these two things, then we have no doubt whatsoever that the detaining authority may reasonably have been satisfied that the applicant was acting in a manner prejudicial to the public safety or the maintenance of public order or the tranquillity of the city of Ahmedabad. It is true, as I have already mentioned, that in this case no other details have been furnished, and the applicant may be handicapped to this extent that in any representation which he may make he may be restricted to denying the allegations and relying on, what may be called, evidence of good character, for example, he has mentioned in his application that he has been doing several good things in the interest of Kisan Sabha and in the interest of general public also. But then the Act contemplates that that may sometimes happen. We have got to remember that when particulars as distinct from grounds are to be given, the only requirement which the section contemplates is that the particulars should be, in the opinion of the detaining authority, sufficient to enable the detenu to make a representation. Whenever the words "in their opinion" are used, that means if subsequently a point as to their sufficiency is raised before the Court, the Court must decline to go into that question. We do not intend to suggest that a fetish should be made of what may be called the grounds of public interest. The statute with which we are concerned was passed not in times of emergency of war but it was passed in peaceful times. What particulars may be furnished even in war times in England can again be seen from the case of *Liversidge v. Sir John Anderson* (1942 A. C. 206) (p. 241). I have already mentioned that the grounds as distinct from particulars were confined to the recital of the appropriate clauses of the section. But when particulars were furnished, they constituted six paragraphs. Reference was made to the detenu being concerned in the management and control of two named organizations and of the nature of speeches and writings of his, they also stated that he was privy to the activities of a named

person in the publication of pro-German propaganda in a named periodical. They also stated that he was subsequently to the outbreak of war communicating with persons in Germany concerned in the Government of Germany, that he was desirous of establishing a national socialist regime in Great Britain with the assistance, if received, of German armed forces, and it was also stated that he freely associated with persons of German nationality whom the Home Secretary had reason to believe were agents of German Government. The particulars supplied in that case show that the authority which supplied them was actuated with the spirit of the free institutions in which it was nurtured and did not choose to take shelter under the letter of law when the grounds came to be supplied. But inasmuch as it is ultimately left to the discretion of the detaining authority to supply such particulars and grounds as are in the opinion of the detaining authority sufficient to enable the detenu to make a representation, we are afraid it is not possible to subject the particulars to any objective test of sufficiency.

[18] I will now go to the last ground which has been made on behalf of the applicant, and that is this that there has been a failure to comply with the provisions of S. 3, inasmuch as the detaining authority did not tell the detenu that he had a right to make a representation not only to it but to the Provincial Government also. Now S. 3, Bombay Public Security Measures Act (Bom. VI [6] of 1947), says that when an order of detention is made in respect of any person, the Provincial Government have among other things to tell the detenu that he has a right to make a representation to the Provincial Government and afford an earliest opportunity of doing so. The Act contemplated *ab initio* that the powers of the Provincial Government under S. 2, may be delegated under S. 21, to a Deputy Commissioner of Police in Greater Bombay and District Magistrates elsewhere. But one thing which has to be noticed is that neither S. 3 nor S. 21, provides that where the powers and duties imposed upon Government are in pursuance of S. 21, delegated to an officer, the right which the detenu had would be to make a representation not to the Provincial Government but to such officer. The learned Government Pleader who appears for the Crown says in this case that it is true that there is no such provision made under S. 3 or S. 21, Bombay Public Security Measures Act, but inasmuch as the powers have been delegated to the District Magistrates and the duty of supplying grounds and supplying particulars has also been laid upon them, it could not have been contemplated that the representation which was to be made should be

made to the Provincial Government rather than to the District Magistrate or the authority which made the detention. He says that the grounds upon which the detention was made was a matter exclusively within the knowledge of the District Magistrate and he would therefore be an appropriate person to consider any representation which might be made by the detenu; and consequently, when the powers have been delegated to a District Magistrate, S. 3 must be read as if for the words "Provincial Government" where they occur in the section after the words "to make a representation" the words "detaining authority" were substituted. Now it has to be remembered that even though S. 21 permits delegation of both powers as well as duties, and even though the power under S. 4 has been delegated to the detaining authority with the result that the detenu has got a right to make a representation to it whether he has got or not a right to make a representation to the Provincial Government, inasmuch as the original section provided that after the order of detention was made the detenu should be given grounds and particulars in order that he should make a representation to the Provincial Government and required that he should be informed of the rights, he has notwithstanding the delegation such a right. It is not as if the delegation which has been effected deprives the Provincial Government of its powers. On the other hand the order which I quoted above shows quite clearly that the powers which have been conferred under S. 3 may in spite of the delegation still be used by the Provincial Government. Nor can the fact that the grounds of detention were the grounds of the satisfaction of the detaining authority create a difficulty because Government can always obtain from it the grounds as well as the material.

[19] It is said, however, that in case it is held that the detenu could make a representation both to the detaining authority and the Provincial Government, the two authorities may come to a contrary conclusion; and it is said that we should not read the section in the way in which the applicant wants us to read, for the result of saying so would be to give rise to two contrary decisions. Now we will assume for the purpose of argument that the detenu makes two representations, one to the detaining authority and another to the Provincial Government. If the Provincial Government wishes to exercise its powers which it still has it would, presumably being aware of the dictum that when a delegating authority embarks upon exercise of the powers which have been delegated the authority to whom the powers are delegated ceases to have jurisdiction, communicate to the latter that it was considering

the representation. It may, of course, happen that the Provincial Government may fail to do so, and we will assume in that case that the detaining authority either comes to one or other of the conclusions. That would not affect, in case the detaining authority has embarked upon the exercise of the powers, the fact that whatever order was subsequently passed by the authority to which the powers were delegated would be without jurisdiction. But assuming for the purposes of argument that the Provincial Government did not embark upon the exercise of the powers even though a representation was made to it, then the detaining authority may release the detenu; after it has released the detenu the Provincial Government has nothing further to do. If, on the other hand, the detaining authority has confirmed the original order which was made, it will be open to the Provincial Government after considering the representation to pass orders either that the detenu should be released or that he should continue to be detained. In our view reading the words in S. 3 in the manner in which the applicant wants us to do would not lead to any such untoward result as the learned Government Pleader argues before us will follow; and inasmuch as we must read the words "Provincial Government" in S. 3 in the usual ordinary manner, we must hold that notwithstanding any delegation the detenu is given a right to make a representation to the Provincial Government. It has got to be remembered that when construing the section we are not entitled to read for the words "Provincial Government" the words "District Magistrate or such other detaining authority as has issued the order" wherever the words occur. It is true that S. 3 does not give as a matter of fact powers but imposes duties and it must be conceded that the obligation mentioned therein is laid upon the detaining authority because of the notification. But where S. 3 uses the words "representation to the Provincial Government", there is no reference either to any powers conferred on the Provincial Government or to any duties laid upon it and consequently the notification by which powers and duties are delegated to the authorities will not enable us to read for the words Provincial Government in the phrase "representation to Provincial Government," the detaining authority. There was consequently a failure to tell the applicant that he had a right to make representation to the Provincial Government. The learned Government Pleader argues before us that the grounds which were communicated to the applicant told the applicant that he was entitled to make a representation and it also told him that the representation was to be sent to the District Magistrate.

Nothing else was communicated to the applicant, and he says, therefore, at any rate, the applicant was not misled in believing that the only representation which could be made was to the District Magistrate. That may be, but we cannot say therefrom that there has been compliance with the mandatory provisions of S. 3 to tell a detenu that he has a right to make a representation to the Provincial Government. It is true that grounds refer to S. 3 and S. 3 makes a reference to the right of the detenu to make a representation. But we are not prepared to say that because of that it can be said that the District Magistrate told the applicant that he had a right to make a representation to the Provincial Government.

[20] There has been, therefore, a defect in the procedure of the District Magistrate; and the only question which remains is what is the effect of this defective procedure. It is contended on behalf of the applicant that inasmuch as this duty was laid upon the District Magistrate in the interests of the detenu we must construe the failure to comply with the mandatory provisions of law as an illegality which affects the whole procedure and consequently affects also the present detention of the applicant. Now every failure to comply with a mandatory provision of law is not an illegality. It certainly is an irregularity, and the question whether such a failure will vitiate the whole proceedings will depend upon the character of the failure, the prejudice that it might have caused and the effect upon any order which has been passed after the causing of the prejudice. Now, in this case, the failure was in respect of telling the applicant that he could make a representation to the Provincial Government. It cannot be said that this did not cause any prejudice to the applicant, because for all we know the applicant may have been ignorant of his right and may not have made any representation to the Provincial Government. But the question is, did this failure affect the order for detention under which the applicant has now been held under detention? If it did not do so, howsoever deplorable the failure, it cannot be said that the detention of the applicant is bad. Otherwise the applicant is entitled to be released.

[21] Now the learned counsel who appears on behalf of the applicant says that as a matter of fact this failure has resulted in his detention without the Provincial Government applying its mind to the case. But that does not affect either the original order which was passed by the District Magistrate under S. 2 nor it can be said to have affected the final order which he passed under S. 4. To the extent that the original order under S. 2 partakes of the nature of a tempo-

rary order because that order has ultimately to be confirmed, set aside, or modified after a representation is made to the detaining authority or the Provincial Government under the provisions of S. 3 it can be characterized as an interim order, see *In re Krishnaji Gopal Brahme*, 50 Bom. L. R. 175 : (A. I. R. (35) 1948 Bom. 360 : 49 Cr. L. J. 524) and the view which was taken in that case was that there has been a failure to supply such grounds as must be supplied under the provisions of S. 3 and the ultimate order which was passed under S. 4 was bad, because it was passed without communicating to the detenu proper grounds which prevented the detenu from making a representation after proper grounds were supplied to him.

[22] It is not necessary in this case to go into the question as to whether when the grounds which are supplied are not such as are referred to in S. 3 the detention is bad because the subsequent order was passed without giving the detenu proper grounds and prejudicing him in the matter of his representation. I shall assume for the purposes of this argument that the order which is passed under S. 4 is a final order, the order under S. 2 being an interim order. We do not know in this case whether the applicant made any representation to the District Magistrate who was the detaining authority or not. Either he did or he did not. If he did presumably the original order has been confirmed. But can we say that the order is bad? The applicant has not made a representation to the Provincial Government because there has been a failure to tell him that he has also got a right to apply to the Provincial Government. We fail to understand how it can be said that the order of the District Magistrate is bad because of the failure. The applicant has still got a right to approach the Provincial Government and presumably there is nothing to prevent the Provincial Government from exercising its powers. If the failure had the result of affecting the representation if any which was made by the applicant to the District Magistrate which had to be considered before an order under S. 4 was made, then it might be said that the failure has prejudiced the applicant, and the order which was passed after the failure is a bad order. There being no such failure, in our view neither the original order, if that is the order under which he is detained, because in the absence of representation the order made under S. 2 would be a final order, nor the final order by the detaining authority after hearing his representation if it was made, is bad.

[23] It remains to make reference to two judgments to which our attention has been drawn for the disposal of the present case. Out of that

one judgment, namely that *In re Chandrabhai Kalidas Bhatt*, Cri. Appeal No. 920 of 1948 dated 15th June 1948 by Chagla C. J. and Gajendragadkar J. need not detain us long. That was a case in which the detenu was furnished with the grounds, two of which are common to that case and the present case. The third ground which was given to the detenu was that the detaining authority was satisfied that he was collecting arms. The learned Judges who disposed of the application had cause to mention the other judgment, namely, the judgment in *In re Dinkar Krishnalal Mehta*, Cri. Appln. No. 848 of 1948, decided by Coyajee and Bhagwati JJ., on 7th June 1948 and they referred to it in these words :

"We would have been most reluctant to differ from the view taken by that Bench if in our opinion the principle of that decision applied to the facts of this case. But before us we have a ground which is much more definite and explicit than the ground that Coyajee and Bhagwati JJ. had before them. Because rightly or wrongly the detenu is charged with collecting arms unlawfully with the object of raising a private army."

It is obvious, therefore, that the learned Judges did not have specially to consider the question as to whether an order which was based only upon two grounds which had been furnished to the detenu in this case would be a valid order.

[24] Then I come to the order in *In re Dinkar Krishnalal Mehta*, Cri. Appln. No. 848 of 1948, decided by Coyajee and Bhagwati JJ., on 7th June 1948. Now I have already mentioned in this case that upon the evidence which has been furnished to us we are not satisfied that there are no agricultural labourers in the city of Ahmedabad. The first judgment, the judgment in *Chandrabhai Kalidas Bhatt*, Cri. Appeal No. 920 of 1948 dated 15th June 1948 by Chagla C. J. and Gajendragadkar J. seems to proceed upon a finding that as a matter of fact there are no agricultural labourers in the city of Ahmedabad. The learned Government Pleader who appears for the Crown suggests to us that this finding is based not upon evidence but upon certain knowledge of the conditions of things in the city of Ahmedabad, which had been imported by one of the Judges in the judgment. Now, we are not sitting in appeal over that judgment and it is not, therefore, for us to investigate upon what evidence the findings of fact upon which the order was based was arrived at. We are reluctant to believe that any personal knowledge was imported in the judgment by any of the Judges. If it has been so imported, it was not proper to do so. But, on the other hand, if it was derived from the evidence, then it was open to the learned Judges upon the evidence in that case to come to the conclusion that there

were no agricultural labourers in Ahmedabad. In that case a question might arise as to whether the order of the District Magistrate can be said to be mala fide or passed with an ulterior motive. No question of the order being bad because there were no agricultural labourers in Ahmedabad can possibly arise, because the only condition precedent which has been laid down for the validity of the order is the satisfaction of the District Magistrate, and if the District Magistrate was satisfied, then the order cannot be challenged subsequently on the ground that the evidence upon which it was based was false. Undoubtedly it was open to the learned Judges in that case because they came to the conclusion upon the evidence that there were no agricultural labourers in Ahmedabad to take evidence of ulterior motive or in the alternative of failure to exercise sufficient care or to apply the mind. In that case it was necessary for the District Magistrate who made the order to satisfy the Court that, notwithstanding the fact that there were no agricultural labourers in Ahmedabad, the order was passed in circumstances in which it could be said that it was a bona fide order. It is true that if we peruse the judgment it does not seem to proceed upon the footing that the fact there were no agricultural labourers in Ahmedabad will go to show that the order was passed mala fide or with an ulterior motive or without taking sufficient care, and if the learned Judges intended to say that whenever it is found that one or more of the facts upon which the order is based is not true it is open to the Court to say that the order was not a justifiable order to pass, we must express our dissent from that view. I have already mentioned that the question of satisfaction of the District Magistrate is a question of fact, but still it is a subjective consideration and not an objective consideration, and whenever subsequently an order is challenged before a Court, the Court is only concerned with the question as to whether the District Magistrate was satisfied. The question may involve in a suitable case an investigation whether sufficient care was or was not exercised, but it is not open to the Court to sit in appeal over an order which has been passed by a District Magistrate, much less it is open to it to consider if circumstances are made out before it in which it would have passed the order or take evidence as to the conclusion of the fact found by the District Magistrate. This view has been established so well that it is not really necessary to mention any authority in support of it, but if any authority is needed then it would be found in *Stuart v. Anderson and Morrison*, 165 L. T. 120 : (1941-2 ALL E. R. 665), referred to in *Liversidge v. Sir John Anderson*, 1942 A. C. 206

at p. 261: (1941-3 ALL E. R. 338). A similar view was also expressed in a Full Bench decision of this Court which is to be found in *In re Rajdhar Kalu Patil*, 50 Bom. L. R. 183 : (A.L.R. (35) 1948 Bom. 334 : 49 Cr. L. J. 465 F. B.).

[25] The applicant therefore fails and the rule must therefore be discharged.

[26] Dixit J. — I agree. With regard to the last contention taken on behalf of the applicant, I desire to add a few words. That contention is that since the detenu was not informed of his right to make a representation to the Provincial Government the detention order is bad. It is manifest from S. 3 that the detaining authority is required to communicate to the person affected by the order the grounds upon which the order has been made and also to inform the detenu of his right to make a representation in order to afford him an earliest opportunity of doing so.

[27] Now, the foundation of the detention order is the existence of a state of mind, and that state of mind has reference to the grounds on which the order is based. It is clear, therefore, that the grounds of an order are inseparable from the order itself. If, therefore, the grounds are vague, the order is bad. If the grounds are outside the ambit of the Act, the order is equally bad; and if no grounds are furnished in support of the detention order, the order is likewise bad. But it cannot be said of the duty on the part of the detaining authority to inform the detenu of his right to approach the Provincial Government that it has any reference to the state of mind of the detaining authority. It is separable from the order; and that being so, the failure on the part of the detaining authority to inform the detenu of his right to make a representation will not and should not affect the validity of the order. This view seems to be in accord with the principle enunciated by Maxwell on the Interpretation of Statutes at page 321, 8th Edition, which is to the following effect :

"The reports are full of cases dealing with statutory provisions which are devoid of indication of intention regarding the effect of non-compliance with them. In some of them the conditions, forms or other attendant circumstances, prescribed by the statute have been regarded as essential to the act or thing regulated by it and their omission has been held fatal to its validity : In others such prescriptions have been considered as merely directory, the neglect of which did not affect its validity, or involve any other consequence than a liability to a penalty, if any were imposed, for breach of the enactment. The propriety, indeed, of ever treating the provisions of any statute in the latter manner has been sometimes questioned, but it is justifiable in principle as well as abundantly established by numerous authorities."

It seems to me, therefore, that the neglect or the omission on the part of the detaining authority to inform the detenu of his right to make a

representation to the Provincial Government does not invalidate the order. At the most, it can be said to be an irregularity. This latter view has been taken in a judgment of this Court in *In re A. S. R. Chari*, Cri. Appln. No. 921 of 1948 dated 24th June 1948 by Chagla C. J. and Gajendra-gadkar J., and I think that view is correct.

Jahagirdar J. — I agree.

R.G.D.

Rule discharged.

A. I. R. (36) 1949 Bombay 334 [C. N. 84.]

DESAI J.

Firm Kishinchand Chellaram — Plaintiffs
v. Firm Vishandas Amarnath — Defendants.

O. C. J. Suit No. 1751 of 1947, Decided on 18th February 1948.

Sale of Goods Act (1930), Ss. 46, 54 and 61 — Purchaser after taking delivery leaving goods at door of seller against his will — Seller getting goods sold by public auction after notice to purchaser — Sale is not re-sale as contemplated by Ss. 46 and 54 — Seller liable to account for fair price of goods at date of sale — Suit by seller against purchaser to recover price on re-sale of goods maintainable and interest under S. 61 can be awarded.

Where the purchaser having taken delivery of the goods subsequently leaves the goods at the door of the seller against his will, the seller has neither the right nor the duty to resale the goods. In such a case if instead of allowing the goods to perish, the seller gets them sold by public auction after notice to the purchaser, the seller's liability being in the nature of liability arising on conversion, he is liable to account to the purchaser for such price as fairly represents the value of the goods at the date of the sale and no more. The sale in such a case is not a re-sale as contemplated by Ss. 46 and 54. The resale as it took place is binding on the purchaser in the sense that the price realized at the resale is fair price. The suit by the seller to recover the price on re-sale of the goods is maintainable and interest can be awarded under S. 61.

[Paras 14, 15, 16, 17]

Annotation: ('46-Man.) Sale of Goods Act, S. 46 N. 1; S. 54 N. 1; S. 61 N. 1.

K. T. Desai and M. P. Laud — for Plaintiffs.

K. A. Somjee and P. P. Khambatta

— for Defendants.

Judgment. — By a contract dated 30th December 1946, the plaintiffs agreed to sell to the defendants 15 bales of raw silk steam filature yarn E Grade pounds 20/22 at Rs. 37.8.0 per pound. By the said contract it is provided that "goods shipped per S. S. 'Monroe' will be delivered on safe arrival after clearing from the Customs House." Mr. K. T. Desai, the learned counsel appearing for the plaintiffs, has relied on cls. 3, 7 and 9 of the terms printed at the back of the contract; whereas Mr. Somjee, the learned counsel for the defendants, has relied on cls. 21 and 22.

[2] On 6th February 1947, the plaintiffs delivered the 15 bales to the defendants. The 15 bales did not bear any tickets. On 7th February 1947,

the defendants wrote to the plaintiffs that the 15 bales were without any tickets, that they had sold the 15 bales to other parties and that Messrs. Bhojaji Sobhagchand who had purchased 10 bales from the defendants out of the said 15 bales had served the defendants with a telegraphic notice that the bales in question were without tickets and that they therefore refused to take delivery and that the other two parties to whom the defendants had sold the remaining five bales were also refusing to take delivery thereof. The defendants further wrote that in the light of what was stated above, the defendants were compelled to ask the plaintiffs to take back the 15 bales and that the bales were lying with the defendants on the plaintiffs' account. By their letter dated 7th February 1947, the plaintiffs replied as follows:

"We are surprised to note your asking us to take back the bundles on which you allege that the tickets are not affixed. We regret we are in no way responsible now as the goods have been taken over by you and delivered by us as per the terms of the contract, in which there is no stipulation whatsoever that all the bundles should have tickets affixed thereto. Please settle our bill immediately and oblige."

These two letters crystallise the dispute which arose between the parties. Thereafter considerable correspondence passed between them. It is not necessary, in my opinion, to refer to that correspondence at length.

[3] The plaintiffs by their attorney's letter dated 13th February 1947, called upon the defendants to pay the sum of Rs. 74,256.6.0 being the price of the 15 bales. The defendants denied their obligation. On 21st February 1947, the defendants returned 10 bales out of the 15 bales to the plaintiffs. In fact the defendants left the said 10 bales on the pavement adjoining the plaintiffs' shop. By their telegram of that date the defendants said that the 10 bales were without tickets and so they were returning them to the plaintiffs' shop and that the defendants were sending also the remaining 5 bales. By their attorneys' letter dated 21st February 1947, (which letter was written before the 10 bales were left at the plaintiffs' shop) the plaintiffs called upon the defendants to pay the price in respect of the 15 bales and added:

"Without prejudice to the above and in order that your clients may not be mulcted in further costs and expenses, we are instructed to suggest that the 15 bales of yarn taken delivery of by your clients from ours should be sent to the auctioneers Messrs. Bennett & Co., who should be asked to sell the same on behalf of the parties concerned. Messrs. Bennett & Co. will take delivery of the said goods on behalf of both our clients and without prejudice to the rights of the parties against each other sell the same and pay over the nett sale proceeds of the goods to our clients."

By another letter dated 21st February 1947, (written after the 10 bales were left at the plain-

tiffs' shop) the plaintiffs' attorneys wrote as follows:

"We have advised our clients to keep the goods with them instead of letting them lie on the pavement, but please note that this will be on your clients' account and at their risk. Please let us know as early as possible whether your clients are agreeable to the goods being sold through Messrs. Bennett and Company as suggested in our letter to you of date."

The plaintiffs' attorneys sent a reminder by their letter dated 25th February 1947, and informed the defendants that the 10 bales were being sent to Messrs. Bennett & Co. with instructions to sell off the same in the best way possible but that the sale would be on the defendants' accounts and at their risk. By the said letter the plaintiffs' attorneys called upon the defendants to send to Messrs. Bennett & Company the five bales in their possession so that the same may be sold off in the same way as the 10 bales. By their attorneys' letter dated 28th February 1947, the plaintiffs wrote that the said 10 bales had been forwarded to Messrs. Bennett & Co. By their attorney's letter dated 3rd March 1947, the plaintiffs called upon the defendants to send to the plaintiffs the remaining 5 bales so that all the 15 bales may be sold off together by public auction. By their attorneys' letter dated 3rd March 1947, the defendants stated that the market had gone down considerably and that it was the plaintiffs' duty to have the goods sold out at the time of default and not wait till the market had gone down considerably as it had then. The 10 bales were advertised for sale on 11th March 1947, but subsequently under instructions from the plaintiffs the sale was postponed to 14th March 1947, when the 15 bales were sold by public auction through Messrs. Bennett & Co. on account of the defendants. As a result of the said sale, Rs. 54,001-14-6 were realized as the price in respect of the 15 bales out of which deducting the auctioneers' commission at the rate of 1 per cent. amounting to Rs. 540, the net sale proceeds came to Rs. 53,461-14-6. The plaintiffs have brought this suit to recover the sum of Rs. 20,870-3-6. I should mention that out of the sum of Rs. 53,461-14-6, the plaintiffs claim by their plaint to deduct the sum of Rs. 75-12-0 for advertising the sale on 11th March 1947, and it is after deducting this sum that they arrive at the aforesaid figure of Rs. 20,870-3-6 as the amount due to the plaintiffs.

[4] The plaintiffs by their plaint deny that there was any express or implied term in the contract that the bales were to bear any ticket or that there was any bazaar custom or dhara that the bales should bear any ticket as alleged by the defendants.

[5] By para. 15 of the plaint the plaintiffs in the alternative claim to recover the sum of

Rs. 21,649-14-6 as damages. The sum of Rupees 21,649-14-6 is made up of the sum of Rs. 20,870-3-6 with interest calculated thereon at the rate of 9 per cent.

[6] The defendants by their written statement admit that they took delivery of the 15 bales on 6th February 1947, and state that they had no opportunity to examine the goods when they took delivery. The defendants say that they rejected the 15 bales as they had no tickets. In para. 7 the defendants state that the plaintiffs are bound under the contract to give goods with tickets. In the alternative they plead that it was an implied term to give goods with tickets. In the further alternative, they say that such was the custom of the trade or bazaar dhara. The defendants deny *in toto* their liability to pay anything to the plaintiffs.

[7] At the hearing before me the following issues were raised :

- (1) Whether the suit as framed is maintainable, being a suit to recover the price on resale of the goods?
- (2) Whether it was an express term of the contract that the plaintiffs should supply goods bearing tickets?
- (3) Whether it was an implied term of the contract that the goods should bear tickets?
- (4) Whether the defendants were entitled to reject the goods on the ground that they bore no tickets?
- (5) Whether the resale is binding on the defendants? and
- (6) Whether the plaintiff is entitled to recover any, and if so, what sum from the defendants?

[8] I should mention that Mr. Khambatta, who was then in charge of the case on behalf of the defendants, specially mentioned that he gave up his contention about the custom of the trade or bazaar dhara.

[9] Parties are agreed about all the important facts and the dates when the incidents took place, the only disputed question being whether the defendants took delivery of the goods after examining them as alleged by the plaintiffs or without examining them as alleged by the defendants. That dispute, to my mind, is not material in the view I take of this case.

[10] I shall, in the first place, consider the defendants' contention that it was either an express term or an implied condition of the contract that the bales should bear a ticket. Now what is written in the manuscript in the contract, exhibit A, as constituting the description of the 15 bales is that the 15 bales were of raw silk steam filature yarn E Grade Pounds 20/22 shipped S.S. "*Monroe*". It is not a term of the contract that in order that the goods should be of contract quality, there should be a ticket affixed to the said goods. In support of his contention that it was an express term of the contract that tickets should be attached to the goods, Mr. Somjee relies on cl. 21 of the printed

terms printed at the back of the contract, exhibit A, which is as follows: "Binding, packing and fold whatever that may be you are bound to take." I fail to see what bearing this clause has on the rival contentions on the subject. Mr. Somjee more particularly and emphatically relies on cl. 22 of the contract which says:

"If goods to arrive by steamer have been sold to you by wire or air mail, then we are not responsible for the design, quality, colour, number or label of the goods. Whatever goods come the purchaser is bound to take delivery thereof without objection."

Mr. Somjee contends that the reason why it is specifically provided by that clause that the plaintiffs were not to be responsible in respect of the label of the goods is that it was contemplated by the parties that the goods should have a label. I do not think that is a correct construction of that clause. What that clause means is that where design, quality, colour, number or label is specified in terms in the contract and there is a difference in design, quality, colour, number or label in the goods as they actually arrive, in that case the plaintiffs are not to be responsible and that the purchaser was bound to make delivery without objection. In my opinion there is no express condition in the contract that the goods should bear labels. It is difficult to understand the value of tickets in reference to goods as they have been sold, especially when tickets carry no value with them as pointed out hereinafter.

[11] One Harnarayan Bhambharam Dhingra, a munim in the employment of the defendants, was called as a witness on behalf of the defendants. He said that the defendants had purchased in all 20 bales, fifteen of them being the subject-matter of the suit and the remaining five bales being the subject-matter of contract No. 113, which contract was arrived at on the same day as the contract in suit, i. e., 30th December 1946. The defendants paid for the 5 bales on 6th February 1947, as the 5 bales bore a ticket, but they did not pay for the 15 bales as they did not bear tickets. Harnarayan stated that the ticket showed the quality of the goods. Mr. K. T. Desai objected to the above answers on the ground that it was an attempt to show that the contract was different from what it appeared to be on the face of the writing. I asked Mr. Khambatta whether it was stated in the points of defence that the ticket indicated the quality of the goods. Mr. Khambatta said that it was not so stated in terms. Harnarayan stated that the 5 bales bore only one kind of ticket but he could not tell what particular ticket was on the 5 bales; it may be any ticket. I asked the witness the question: "Is the quality the same whatever may be the ticket or does the quality vary according to the

ticket?" The only answer that I could get was that the quality was written on the ticket, whatever the ticket may be. The question was repeated and the answer given was: "Each manufacturer has got his own ticket." I again asked the witness: "Are the goods sold according to the grade, e. g. E. grade? Or are they sold by the description of the ticket?" The answer given was: "The grade is written on the ticket." Thereupon in despair I gave up the attempt to get an answer to my question. The reason why I asked that question was that if the tickets did not indicate the quality, there was no point in making the ticket a term of the contract.

[12] In my opinion the goods were sold by description as clearly stated in the contract and they were sold without there being any written or other obligation to have a ticket attached to the goods. I am, therefore, of the opinion that there was no express or implied obligation that the goods should bear tickets. In order to hold that there was an implied obligation, I must come to that conclusion as a matter of necessity, a conclusion so irresistible on the facts of the case, that it was as plain as something written in terms in the contract. In my opinion there are no facts which raise that necessary conclusion. In this connection it is significant to note that the defendants have given up their case that the custom of the trade required that the goods should have a ticket attached to them.

[13] I, therefore, answer issue Nos. 2 and 3 in the negative. In the result issue No. 4 must also be answered in the negative.

[14] I shall now come to issue No. 1, namely, whether the suit as framed is maintainable, being a suit to recover the price on resale of the goods? Now, in my opinion, this suit is a suit to recover the price of the goods. But the plaintiffs having got the goods sold through auctioneers and realized certain moneys, have got to give credit, and they have, therefore, given credit for these moneys against their claim for recovery of the price. Mr. Somjee has argued that cls. 7 and 9 of the printed terms at the back of the contract are not in terms referred to in the plaint, and I must, therefore, disregard them, and that the plaintiffs claim to resell the goods under cl. 3 of the contract in suit cannot be sustained. Mr. Somjee says that cl. 3 has no application where the goods have been rejected as in this case they were by the defendants. In my opinion cls. 3, 7 and 9 have no application to the facts of this case. In my opinion this is not a suit to recover the deficiency in price on the footing of a re-sale as referred to in ss. 46 and 54, Sale of Goods Act. Sections 46 and 54 contemplate that the unpaid seller of goods has

not parted with possession thereof to the purchaser and that he has, therefore, a lien on the goods sold and while he is in possession of them, he has got the right of resale. Those sections do not contemplate the case where the purchaser has already taken delivery of the goods. The possession then is with the purchaser, and it is not transferred to the vendor by the purchaser subsequently leaving the goods at the vendor's door. In such cases the vendor has neither the right (except at the request of the purchaser) nor the duty to resell the goods. If the vendor disposes of those goods, he is liable on the footing of conversion.

[15] What then is the position in reference to these goods in which the property had in my opinion passed to the defendants and which they had no right to reject? The defendants left the 10 bales opposite the plaintiffs' shop on the pavement against the plaintiffs' will. Instead of allowing these goods to perish and go waste, the plaintiffs got them sold by public auction along with the other 5 bales after notice to the defendants and on the defendants' account. That action of the plaintiffs may be justified or not, but that sale was not a re-sale as contemplated by the contract or by the Sale of Goods Act. The plaintiffs' liability being in the nature of liability arising on conversion, the plaintiffs, in my opinion, are liable to account to the defendants for such price as fairly represents the value of the goods at the date of the sale, and no more, especially in a case like this, where the plaintiffs had no other course left open to them. As the sale was not a re-sale within the meaning of the Contract or the Sale of Goods Act, the question, whether the sale was unreasonably delayed and the consequences of such delay, does not, in my opinion, arise for my decision. If it did, I am of the opinion that the sale was not held unreasonably late. The goods were left at the plaintiffs' shop on 21st February 1947, and they had to take legal opinion as to what should be done with these goods and they had to advertise the goods for sale. The sale was advertised for 11th March 1947, and it was postponed to 14th March 1947, in order that all the 15 bales may be sold together. The only question is whether the price which the plaintiffs have given the defendants credit for in respect of the said 15 bales is a fair price. In my opinion, the sale was a bona fide sale properly advertised and conducted, that it was the only proper method of selling off the goods, and the price is in consequence a fair and bona fide price which the plaintiffs realized in respect of the goods. The defendants have filed no counter-claim claiming damages in respect of conversion of these goods. That is natural when one remembers that the defendants' contention

is that they had nothing to do with these goods. I answer issue No. 1 in the affirmative.

[16] As regards issue No. 5, the re-sale was not a re-sale within the meaning of the Sale of Goods Act. But the actual re-sale as it took place is binding on the defendants in the sense that the price realized at the re-sale was a fair price. I answer issue No. 5 in the affirmative.

[17] So far as the claim for interest is concerned, the Sale of Goods Act, s. 61, applies. I, therefore, award the plaintiffs interest but at the rate of 6 per cent. only instead of at the rate of 9 per cent. as claimed by the plaintiffs.

[18] So far as the claim for Rs. 75-12-0 being charges of the advertisement for the first sale is concerned, Mr. K. T. Desai gives up his claim in respect of the same.

[19] In the result there will be a decree in favour of the plaintiffs for Rs. 20794-7-6 with interest on Rs. 74,256-6-0 at the rate of 6 per cent. from 6th February 1947, till 14th March 1947, further interest on Rs. 20,794-7-6 at the rate of 6 per cent. from 15th March 1947, till judgment, costs of the suit and interest on judgment at 4 per cent. Costs to include costs of the chamber summons.

D.H.

Suit decreed.

A. I. R. (36) 1949 Bombay 337 [C. N. 85.]

CHAGLA C. J. AND COYAJEE J.

Shivji Bhara & Co. — Plaintiffs — Appellants v. Kanji Vasanji and others — Defendants — Respondents.

O. C. J. Appeal No. 78 of 1948, Decided on 4th March 1949.

(a) Bombay Rents, Hotel and Lodging House Rates (Control) Act (LVII [57] of 1947), S. 50 — Suit for recovery of rent — Suit by tenant against landlord for recovery of excess rent or pugree is not such suit — Suit pending in High Court when Act came into force — S. 50 does not apply and suit need not be transferred to Small Cause Court.

A suit for recovery of rent can only be filed by a landlord against a tenant and that is the only kind of suit contemplated by S. 50. A suit by a tenant to recover excess rent or pugree which he has paid to his landlord is certainly not and cannot be a suit for recovery of rent within the purview of S. 50. The suit he is filing is to recover the amount which his landlord has wrongfully obtained from him and to which he is not entitled. To use a well known English expression, it would really be a suit for moneys had and received by the defendants.

[Para 4]

A suit for recovery of excess rent under S. 20 of the Act may no doubt be a suit in respect of a claim arising under the Act but such suits are not made transferable under S. 50 to Small Cause Court. Hence if such a suit is pending in the High Court when the Act came into force the High Court would have jurisdiction to try the suit.

[Paras 4 and 5]

(b) Interpretation of Statutes — Act ousting jurisdiction of Court to be strictly construed.

When the Legislature ousts the jurisdiction of the High Court, the language used by the Legislature must

be very strictly construed and the Court must lean against holding that the Legislature has attempted to oust the jurisdiction of the High Court except in those classes of cases which are clearly and specifically indicated by the Legislature. [Para 4]

Annotation: ('44-Com) Civil P. C., Pre. N. 7 Pt. 64.

(c) Civil P. C. (1908), S. 9 — Objection to jurisdiction of High Court — High Court must accept allegations in plaint and decide question of jurisdiction on that basis.

While considering the question of jurisdiction the High Court must accept all the averments and allegations contained in the plaint. A plea as to jurisdiction which is tried as a preliminary issue is in the nature of a demurrer and the defendants can only contend that the High Court has no jurisdiction on the allegation that assuming all that is said in the plaint is true, still the Court could have no jurisdiction. [Para 4]

Annotation: ('44-Com.) Civil P. C., S. 9 N. 7 pts. 2 & 3.

R. J. Kolah—for Appellants.

N. A. Palkhiwalla (for No. 2) and *V. F. Taraporewalla*, and *C. M. Trivedi* (for 3 to 7) —
for Respondents.

Chagla C. J.—The only question that arises in this appeal is whether the suit filed by the plaintiffs is maintainable in this Court or it should be transferred to the Court of Small Causes under the provisions of Bombay Act, LVII [57] of 1947. It would appear that the plaintiffs were the tenants of the defendants who are trustees of a charitable trust in respect of three godowns for some time prior to the explosion that took place in Bombay on 14th April 1944. In the explosion two of the godowns were destroyed. The plaintiffs vacated the third godown as it was required by the defendants for storing certain articles. Thereafter the plaintiffs wanted to resume possession of the third godown, and according to the plaintiffs the defendants agreed to give possession of the third godown provided the plaintiffs not only paid the rent of Rs. 125 which was the proper rent, but also a *pugree* aggregating to Rs. 5,200 worked out on the basis of Rs. 400 being paid per month for a period of 13 months during which the tenancy was to continue. According to the plaintiffs it was also agreed that with regard to the tenancy of certain months anterior to the explosion for which the plaintiffs had not paid rent, they should pay a *pugree* of Rs. 60 a month for $5\frac{3}{4}$ months, which came to Rs. 345. According to the plaintiffs, they paid these two *pugrees* and went into possession of the godown and they filed the present suit for recovering that amount.

[2] Now, the learned Judge held that this suit was not a suit for recovery of the *pugree*, but it was a suit for the recovery of excess rent paid by the plaintiffs, and, therefore, this Court had no jurisdiction to try the suit but the suit was triable by the Court of Small Causes. It is rather significant to note what the defence of the defen-

dants was with regard to the claim of the plaintiffs. Defendant 1 took no part in the proceedings. Defendant 2's contention was that these amounts claimed by the plaintiffs were *pugrees*, but they were paid to defendant 7 and that defendants 5, 6 and 7 had on different occasions admitted that this *pugree* had been received from the plaintiffs. With regard to defendants 3 to 7, who put in a joint written statement, their contention was that after the tenancy terminated on the explosion having taken place, the plaintiffs were no longer the tenants of the defendants but they were mere licensees, and the defendants required the plaintiffs as a term of the license to contribute the sums of Rs. 5,200 and Rs. 345 as a donation to a charity fund which had been set up. Therefore, it is important to note that it was the case neither of the plaintiffs nor of any of the defendants that the sum that the plaintiffs were claiming was excess rent or an amount paid as rent in addition to the rent chargeable under the Rent Restriction Act. The plaintiffs' case was it was *pugree*. The case of defendant 2 was it was *pugree*. The case of defendants 3 to 7 was that there was no tenancy, the plaintiffs were merely the licensees, and the amount paid was certainly not rent but a donation paid to a charity fund. At the hearing counsel for defendants 3 to 7 gave up the contention that the plaintiffs were the licensees. He admitted the position taken up by the plaintiffs that they were the tenants. Then the learned Judge, without there being any specific issue on the point and without there being any proper pleadings as I have pointed out, on his own as it were came to the conclusion that what the plaintiffs claimed in the suit was not *pugree* but excess rent. It seems to us that the learned Judge was in error in coming to that conclusion. But even assuming that the learned Judge was right, as in my opinion the matter is concluded by a proper construction of S. 50 of Bombay Act LVII [57] of 1947, it is unnecessary to go further into this question.

[3] Now, on the question of jurisdiction, Bombay Act LVII [57] of 1947 contains two sections which are pertinent to the question of jurisdiction that the High Court has with regard to suits falling under the Act. Section 28 deals with suits to be filed after the coming into operation of this Act. That section is in very wide terms and ousts the jurisdiction of this Court to try all suits and proceedings between a landlord and a tenant relating to the recovery of rent or possession of any premises to which the provisions of the Act apply. It also ousts the jurisdiction of this Court to decide any application made under the Act and to deal with any claim or question arising out of the Act or any of its provisions. With regard to pending suits, the Legislature enacted S. 50 and

it will be apparent that S. 50 is much narrower in its application than S. 28. Section 50 provides that all suits and proceedings between a landlord and a tenant relating to the recovery or fixing of rent or possession of any premises to which the provisions of Part II apply (the rest of the words are not material) which are pending in any Court, shall be transferred to the Courts mentioned in the Act. Therefore, as far as pending suits are concerned, it is only suits relating to the recovery or fixing of rent or possession of premises between a landlord and a tenant that had to be transferred to the Small Causes Court. It will be important to note that the Legislature in S. 50 does not deal with any suits relating to any claim arising out of this Act. Therefore, it is again clear that all suits pending in this Court when the Act came into force had not to be transferred to the Small Causes Court. It was only the restricted class of suits mentioned in S. 50 that had to be transferred and in respect of which this Court had no jurisdiction.

[4] Now, whether the plaintiffs' suit is to recover excess rent or pugree which he has paid to his landlord, it certainly is not and cannot be a suit for recovery of rent. A suit for recovery of rent can only be filed by a landlord against a tenant and that is the only kind of suit contemplated by S. 50. When a tenant pays pugree or when he pays excess rent he is certainly not filing a suit for the recovery of rent. The suit he is filing is to recover the amount which his landlord has wrongfully obtained from him and to which he is not entitled. To use a well known English expression, it would really be a suit for moneys had and received by the defendants, and I cannot understand how by any stretch of language could it ever be suggested that an action by a tenant to recover excess moneys paid to the landlord could ever be described as a suit for the recovery of rent. Mr. Taraporewalla says that S. 20 gives the right to a tenant to recover excess rent, and S. 18 gives him the right to recover any premium paid by him, and, therefore, Mr. Taraporewalla's contention is that as a tenant has been given the right under S. 20 to recover excess rent, in filing this suit what the plaintiffs are doing is to recover excess rent to which they have been given the right under S. 20 of the Act. It is true that the plaintiffs in filing this suit are availing themselves of the right given to them under S. 20. They are filing a suit in respect of a claim arising out of the Act. But these suits are not made transferable under S. 50. Even if it is a suit to recover excess rent paid by the plaintiffs to the defendants under S. 20, in my opinion that suit cannot be characterised or described as a suit for the recovery of rent. It is a well established canon of construction that when the

Legislature ousts the jurisdiction of the High Court, the language used by the Legislature must be very strictly construed and the Court must lean against holding that the Legislature has attempted to oust the jurisdiction of this Court except in those classes of cases which are clearly and specifically indicated by the Legislature. The only class of cases which are clearly and specifically indicated by the Legislature are suits for the recovery of rent, and, as I have said earlier, such suits can only be filed by a landlord against a tenant for the recovery of rent. But really when we are considering the question of jurisdiction we must accept all the averments and allegations contained in the plaint. A plea as to jurisdiction which is tried as a preliminary issue is in the nature of a demurrer and the defendants can only contend that this Court has no jurisdiction on the allegation that assuming all that is said in the plaint is true, still the Court could have no jurisdiction. If we were to take the averments of the plaintiffs in their plaint, they have filed the suit for the recovery not of excess rent but of pugree. The learned Judge concedes that if this was a suit for the recovery of pugree, this Court would have jurisdiction. They may ultimately fail to establish their case, but as far as jurisdiction is concerned, it was incumbent on the learned Judge to accept the averments made by the plaintiffs in the plaint.

[5] In my opinion, therefore, this is clearly a suit which does not fall within the purview of S. 50 of Bombay Act LVII [57] of 1947 and, therefore, this Court has jurisdiction to try the suit. The order, therefore, made by the learned Judge that this suit should be transferred to the Small Cause Court is erroneous and must be set aside.

[6] The result, therefore, is that the appeal is allowed with costs. The appellants will also be entitled to the costs occasioned by the trial of the preliminary issue before the trial Court. Respondents 3 to 7 to pay the costs of the appellants as well as of respondent 2.

Coyajee J.—I agree.

K.S.

Appeal allowed.

A. I. R. (36) 1949 Bombay 339 [C. N. 86.]
CHAGLA C. J. AND COYAJEE J.

Sir Fazal Ibrahim Rahimtoola—Appellant
v. Appabhai G. Desai—Respondent.

Appeal No. 49 of 1948, Decided on 8th March 1949, from order of Bhagwati J.

(a) Companies Act (1913), Ss. 177B (2) and 196—Statutory jurisdiction under section 196 can be invoked on application by official liquidator under that section—Report under S. 177B (2) not necessary.

It would be open to the Court to make an order under S. 196 if the official liquidator applies under

S. 196 and in his application states that in his opinion a fraud has been committed by any person whom he wants to get examined under the section. It is not correct to say that the statutory jurisdiction of the Court under the section can only be invoked after the official liquidator has made a report under S. 177-B (2).

[Para 3]

Annotation : ('46-Man) Companies Act, S 196 N 1.

(b) Companies Act (1913), S. 196 — Section aims at person charged with fraud and not at person concerned with working of company and not charged with fraud by liquidator.

Looking to the whole scheme of the Act and of the section, the section only aims at those persons who are charged with fraud and not those persons who may be concerned with the working of the company and are not charged by the liquidator with fraud: (1896) A. C. 146, *Ref.*

[Para 4]

Annotation : ('46-Man) Companies Act, S 196 N 1.

(c) Companies Act (1913), S. 196—Official liquidator setting out necessary facts raising necessary inference of fraud against certain person—Jurisdiction of Court under section is attracted.

It is not necessary for the liquidator in terms to say that the party against whom he is seeking for an order of public examination is guilty of fraud. If he sets out all the necessary facts from which the necessary inference can be drawn by the Court that there is a *prima facie* case of fraud, that would be sufficient in law to attract the jurisdiction of the Court.

[Para 6]

Annotation : ('46-Man) Companies Act, S 196 N 1.

(d) Companies Act (1913), S. 196—Orders under, not to be made *ex parte*.

The practice of passing *ex parte* orders involving the person affected in serious liability is much to be deprecated. Hence orders for public examination under S. 196 should not be made *ex parte*: 30 Bom. 173, *Rel. on.*

[Para 7]

Annotation : ('46-Man) Companies Act, S 196 N 1.

Sir Jamshedji Kanga and Murzban J. Mistree — for Appellant.

C. K. Daphtary, Advocate-General, with M. P. Amin and M. L. Maneksha — for Respondent.

Chagla C. J. — This is an appeal from an order of Bhagwati J., making an order for the public examination of Sir Fazal Ibrahim Rahimtoola on a summons taken out by the official liquidator of the Associated Banking Corporation of India, Ltd., under S. 196, Companies Act.

[2] The order is contested by Sir Jamshedji mainly on two grounds. The first ground is that the order made was without jurisdiction. Now, jurisdiction of the Court to make an order for the public examination of a director—and Sir Fazal was a director of the company with which we are concerned in this case—is founded on S. 196, Companies Act. That section provides that

"when an order has been made for winding up a company by the Court, and the official liquidator has applied to the Court stating that in his opinion a fraud has been committed by"

then the section goes on to state the class of persons who might be guilty of fraud, and then it goes on, ". . . . the Court may, after consideration of the application, direct that any person", and then it sets out the same class of

persons which are mentioned earlier in the section. There is another section to which attention might be drawn in order to understand Sir Jamshedji's contention, and that is S. 177B. Sub-clause (2) of that section provides:

"(2) The official liquidator may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in its promotion or formation or by any director or other officer of the company in relation to the company since the formation thereof, and any other matter which in his opinion it is desirable to bring to the notice of the Court."

Briefly put, Sir Jamshedji's argument is this that the statutory jurisdiction of the Court can only be invoked after the official liquidator has made a report under S. 177B (2) and the Court can only make an order under S. 196 after taking into consideration the report made by the official liquidator. Sir Jamshedji says that the jurisdiction of the official liquidator to make a report is based upon S. 177B (2), and he having made that report, it is for the Court to consider it and then proceed to decide whether any particular person should or should not be publicly examined.

[3] Now, let us consider a few facts as to how the official liquidator came to apply for an order under S. 196. On 21st May 1948, the official liquidator submitted a report to the Vacation Judge and headed that report as being pursuant to Ss. 197, 196, 195 and 237. On that report the learned Judge gave directions to the official liquidator to take out a chamber summons for the public examination of the various persons mentioned in his report as being party to the fraud. Thereupon the official liquidator took out a chamber summons on 28th May 1948, and it was on this summons that the learned Judge made the order complained of. Sir Jamshedji says that the report of the official liquidator is not made under S. 177B but under other sections. Looking to the report it is obvious that the report is made for the purpose of ultimately getting an order under S. 196, and in my opinion at the most there is a clerical error on the part of the official liquidator in not mentioning S. 177B along with other sections that he has mentioned. But I would go further. Looking to the provisions of the law in this country, I am not at all sure that it is not open to the official liquidator to make an independent report under S. 196 from the report contemplated by S. 177B. It is necessary to consider the analogous law which we find in England. The provision with regard to the public examination was first introduced into the English company law by the Companies Winding Act of 1890 and S. 8 (2) corresponds to S. 177B (2) and S. 8 (3) corresponds to S. 196 of our Companies Act. It

is very significant to note that S. 8 (3) speaks of "the Court may, after consideration of any such report", any such report being the report referred to in S. 8 (2) corresponding to our S. 177B. When we turn to our S. 196, there is no reference whatever to the report which the official liquidator has got to make under S. 177B. When we turn to the English Companies Act, which is in force today, we find that S. 182 corresponds to S. 177B and S. 216 corresponds to S. 196, and S. 216 provides that

"where an order has been made in England for winding up a company by the Court and the official receiver has made a further report under this Act . . ."

and that report under the Act is obviously the report referred to in S. 182. Again, no similar words are to be found in S. 196 of our Companies Act, and therefore, in my opinion, it would be open to the Court to make an order under S. 196 if the official liquidator applies under S. 196, and in his application he states that in his opinion a fraud has been committed by any person whom he wants to get examined under that section. There is no doubt that in this case when the official liquidator applied by the chamber summons for an order under S. 196 he has clearly and categorically stated that in his opinion Sir Fazal was guilty of a fraud and that he should be publicly examined. Therefore I see no force in Sir Jamshedji's contention that the order made by the learned Judge was an order without jurisdiction.

[4] Now coming to the second contention, Sir Jamshedji's submission is that looking to the report of the official liquidator dated 21st May 1948, no *prima facie* case of fraud has been made out by the liquidator against his client and therefore the order made by the learned Judge is not a proper order. I may just mention in passing that it is rather curious the way our S. 196 has been drafted by the Legislature. If one were to give to the language used in that section its plain grammatical meaning, one would come to the conclusion that once a fraud is alleged against any person in the promotion or formation of the company or against a director, manager or any other officer of the company, then any one of these persons can be examined even if he himself was not guilty of the fraud. It would be enough to allege fraud against one person falling in the category in the first part of the section and then it would be open to the Court even to make an order against any other person mentioned in the second category. I may point out that both the categories are common to S. 196. In the latter part it is not stated that an order can only be made against such person who is charged with fraud under the first part of the section. Curiously enough, provision in the English Compa-

nies Winding Act, 1890, was similar. The matter came for consideration before the House of Lords in *Ex parte Barnes*, (1896) A. C. 146 : (65 L. J. Ch. 394), and the learned Law Lords after considering the scheme of the section and of the Act came to the conclusion that however the section might have been worded, an order under S. 196 can only be made against a person who was charged with fraud. After that the different English Companies Acts were consolidated and we come to the present Act of 1929, and when we turn to S. 216 we find that the language used is clear and the second part of that section provides that the Court may, after consideration of the report, direct that that person shall attend before the Court and be examined in public. Therefore, the expression "that person" in relation to what has gone before makes it clear that it is only the person charged with fraud who can be examined in public. But our section remains what it was and the Legislature has not thought fit to bring the language of the section into line with the true position in law. But we must accept Sir Jamshedji's contention that looking to the whole scheme of the Act and of the section, the section only aims at those persons who are charged with fraud and not those persons who may be concerned with the working of the company and are not charged by the liquidator with fraud. Therefore we must now consider whether on the materials before us it can be said that in the opinion of the liquidator a *prima facie* case has been made out against the appellant of fraud.

[5] Now, to say the least, this particular Bank that was set up was run in a most extraordinary and curious manner. It seemed more to be a domestic family affair than a public corporation looking after the interests of the shareholders and the depositors. The majority of the shareholders were all relations. At the head of the tree stood Cassumally Munjee with his sons, his son-in-law, the father-in-law of his son, Sir Fazal Rahimtoola, and the liquidator in his report clearly states that the affairs of the Bank rested exclusively with Cassumally Munjee, his said two sons, his son-in-law Mahomedally Javeri, and Sir Fazal Rahimtoola. Then the liquidator goes on to point out various gross cases of fraud which came to light after the company went into liquidation. He points out that the Munjees and their allied concerns are indebted to the Bank in the sum of Rs. 13,00,000 and there is also a prospective liability for calls of about 6½ lacs, and he adds that the Munjees have dominated the Bank and they have literally played ducks and drakes with the moneys of the Bank which they have advanced to themselves and their allied concerns without any intention to repay the

same. He then points out the case of a loan of 38 lacs being advanced to Shiraj Ali Hakim and his relative Gulam Mahomed Ebrahim. This loan was advanced on so-called securities which were not worth the paper on which they were printed. Then he deals with the case of a fixed deposit of Rs. 5 lacs made by Messrs. Kardar Productions. It seems that on this fixed deposit Kardar Productions were allowed to have an overdraft account. Then he was persuaded by the Munjees to transfer the fixed deposit of Rs. 5 lacs to one of their own concerns and to replace this fixed deposit a guarantee was given by one of their firms. On that the Bank was left with the paper guarantee of one of the Munjee concerns and the hard cash of Rs. 5 lacs disappeared from the Bank and went to fill the till of the Munjee concerns. Then there is another instance of this Shiraj Ali Hakim having pledged with the Bank 62,500 shares of the Famous Cine Laboratory and Studios, Ltd., against a loan given to him. Subsequently he was allowed to remove these securities and he handed over these securities to another creditor of his, Govindram Rungta. So the Bank was left without any securities to secure this particular loan.

[6] Now Sir Jamshedji says that there is no specific averment by the liquidator in this report that his client is guilty of fraud. I frankly admit that this report could have been much better drafted. But as has been pointed out in England in many decided cases, it is not necessary for the liquidator in terms to say that the party against whom he is seeking for an order of public examination is guilty of fraud. If he sets out all the necessary facts from which the necessary inference can be drawn by the Court that there is a *prima facie* case of fraud, that would be sufficient in law to attract the jurisdiction of the Court. Let us take two or three important allegations made by the official liquidator in this report. He says that Sir Fazal Rahimtoola along with the other directors was in the exclusive control and management of the Bank. He then points out various cases of fraud being practised upon the share-holders and the depositors by the money of the Bank being lent out on worthless securities or in order to benefit the Munjees. Then he points out that Sir Fazal Rahimtoola is closely related to the Munjees. In my opinion, the inference is irresistible, and the inference is that a man who is a director of the Bank and who takes an active part in the management of the Bank cannot but know of what was going on in the Bank, and therefore what the liquidator in effect does is this: he suggests that Sir Fazal is privy to the frauds practised which he has enumerated in his report. Sir Fazal made an affidavit in reply to the

affidavit made by the official liquidator in support of the chamber summons, and it is pertinent to note that in this affidavit there is no denial of the statement in the report that he along with a few other directors was in exclusive charge, control and management of the affairs of the Bank, nor is there any statement with regard to the various frauds set out by the official liquidator, nor does he say that he was not aware of all that was going on in the Bank. It is a contentious affidavit which merely takes up a technical defence and does not place any materials before the Court which would lead the Court to the opinion that the opinion of the liquidator was not justified. Then to this affidavit the official liquidator made an affidavit in rejoinder and in that affidavit he categorically states that the records of the Bank show that Sir Fazal Rahimtoola has attended almost all the meetings of the directors and also the meetings of the sub-committees appointed to sanction loans and that he has voted for the various loans which have directly or indirectly benefited the Munjees. So here we have a definite statement by the liquidator that Sir Fazal had voted for the loans advanced to the Munjees. As the record stands the appellant has not chosen to put in any affidavit in rejoinder to challenge the statement in the affidavit.

[7] There is rather an important point of practice to which Sir Jamshedji has drawn our attention. The official liquidator took up the attitude that orders for public examinations under S. 196 can be made *ex parte*. We wish to make it clear that in our opinion that would not be a sound practice for the Court to adopt. The Advocate-General draws our attention to the practice prevailing in England and that practice is that an order is made *ex parte* for the public examination of a person, then an order is served upon him, and it is open to him to come to Court to get that order discharged. That strikes us as rather a circuitous way of achieving the same result. It would be much better to adopt the practice which was followed in this case, viz., that when an order is sought for under S. 196, the official liquidator should take out a chamber summons and the chamber summons should be served upon the persons affected so that the Court before it makes an order would have all the materials before it. I may also draw attention to the warning sounded by Sir Lawrence Jenkins in *The Ahmedabad Advance Spinning and Weaving Company v. Lakshmishanker*, 30 Bom. 173 : (7 Bom. L. R. 246). He said that the practice of passing *ex parte* orders involving the person affected in serious liability is much to be deprecated. With very great respect I entirely endorse this sentiment.

[8] The order made by the learned Judge is a discretionary order and in appeal it is for Sir Jamshedji to satisfy us that we should interfere with the discretion exercised by the learned Judge. We would only interfere with that discretion if we were satisfied that there were no materials before the learned Judge on which he could have come to the conclusion that no *prima facie* case for investigation of fraud had been made out against the appellant. I have drawn attention to all the materials which were before the learned Judge and it is impossible to say that on these materials the learned Judge was not justified in making the order that he did. The result is that the appeal fails and must be dismissed with costs.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 343 [C. N. 87.]

CHAGLA C. J. AND COYAJEE J.

Ghelabhai Mahasukhram Roy — Plaintiff
— *Appellant v. Keshavdev Madanlal Nemani*
— *Defendant—Respondent.*

O. C. J. Appeal No. 48 of 1948, Decided on 4th March 1949, from judgment of Bhagwati J., D/- 21st July 1948.

(a) Arbitration Act (1940), S. 34—*A* engaging *B* as broker—*B* entering into transactions—On 23rd October 1947, there was certain outstanding transaction—*B* alleging that under instructions from *A* on 5th November 1947 he closed outstanding transaction by entering into cross contract—*A* alleging that under his standing instructions outstanding transaction should have been *badla* to next settlement—Dispute referred to arbitrator under R. 117 (a) of Native Share and Stock Brokers' Association—Held as factum of contract itself was not disputed but mode of performance only was disputed arbitrator had jurisdiction to enter on the reference.

It is well established law that if one of the parties to a reference disputes the factum or existence of the contract in respect of which disputes arise and which disputes the arbitrator has got to determine, then the arbitrator has no jurisdiction to decide the question whether in fact the contract was entered into or not.

[Para 2]

A engaged *B* as his broker and *B* put through many transactions under the rules and bye-laws of the Native Share and Stock Brokers' Association of which he was a member. On 23rd October 1947 there was an outstanding transaction of purchases of 125 Tata deferred shares. It was contended by *B* that on 5th November 1947 *A* gave him instructions to close this outstanding transaction by entering into a cross contract and pursuant to the instructions *B* closed the outstanding transaction. As a result of this, certain amount became due and payable by *A*. *B* made the demand but *A* failed to make the payment. It was the case of *A* that he had given standing instructions to *B* that the outstanding transactions should be *badla* to the next settlement. The matter was referred to arbitration under R. 117 (a) of the Association :

Held, that if either *A* or *B* had disputed the factum or existence of the contract of 23rd October 1947 then it would not have been open to the arbitrator to go into that question. The transaction of 5th November

1947 was, however, not an independent transaction but was a transaction entered into for the purpose of working out and performing the outstanding contract of 23rd October 1947. The dispute was with regard to the mode of performance of the contract and not with regard to the contract itself. If instructions are given in pursuance of an outstanding contract or in relation to an outstanding contract and these instructions are to close an outstanding contract, the contract entered into in pursuance of these instructions can be the subject-matter of the reference to arbitration even though the instructions may be disputed by the constituent. As the factum of contract itself was not in dispute the arbitration had jurisdiction to enter upon the reference : *Case law referred.* [Paras 3 and 5]

Annotation : ('46-Man) Arbitration Act, S. 34 N 10.

(b) Native Share and Stock Brokers' Association, R. 117 (a) — Rule made term of contract between constituent and broker — Rule binding on parties even assuming *ultra vires* the Association—Bombay Securities Contracts Control Act (VIII [8] of 1925), S. 5.

Where R. 117 (a) of the Native Share and Stock Brokers' Association had been made a term of the contract between the broker and the constituent :

Held, that assuming that the rule was *ultra vires* the Association, not having been made with the sanction of the Governor in Council under S. 5, Bombay Act VIII [8] of 1925 the rule having been made a term of the contract was binding on the parties.

[Para 6]

M. P. Amin and R. M. Dalal — for Appellant.

Sir Jamshedji Kanga and M. L. Maneksha —
for Respondent.

Chagla C. J. — This is an appeal from a judgment of Bhagwati J. dismissing a petition of the appellant to set aside an award. The award came to be made in these circumstances. The appellant engaged the respondent as his broker and the respondent put through many transactions under the rules and bye-laws of the Native Share and Stock Brokers' Association of which he is a member. On 23rd October 1947, there was an outstanding transaction of purchases of 125 Tata deferred shares. According to the broker, on 5th November 1947, the appellant gave him instructions to close this outstanding transaction by a sale of 125 Tata deferred shares, and pursuant to these instructions the broker closed the outstanding transaction. As a result of this, a certain amount became due and payable by the constituent to the broker. The broker made a demand, the constituent failed to make the payment, the matter was referred to arbitration under R. 117 (a), Native Share and Stock Brokers' Association, the arbitrator made his award, and it is this award which is being challenged by the petitioner in his petition.

[2] Now, the first contention raised before us by Mr. Amin is that the arbitrator was not competent to enter upon a reference because what was disputed before him was the very factum of the contract. It is well established law that if one of the parties to a reference disputes the factum or existence of the contract in

respect of which disputes arise and which disputes the arbitrator has got to determine, then the arbitrator has no jurisdiction to decide the question whether in fact the contract was entered into or not. Mr. Amin says that in this case the factum or existence of the contract was disputed by his client and, therefore, the arbitration was not competent. In order to understand this contention, let us see what the rival contentions of the parties were before the matter went to arbitration. The case of the broker was that on 5th November instructions were given by the constituent through his sub-broker to square up the outstanding transaction of the 125 Tata deferred shares by entering into a cross contract. The contention of the constituent was that he had given standing instructions to his broker that the outstanding transactions should be *badla*, and that he went away to Delhi when the transaction was still outstanding. When he returned to Bombay and found that the contract for the transaction of 5th November had been sent to him, he protested and contended that according to his standing instructions the outstanding transaction should have been *badla* to the next settlement. On these disputes the arbitrator gave his decision holding in favour of the broker.

[3] Now, it seems to us that what the arbitrator was considering was how the outstanding transaction of the purchase of 125 Tata deferred shares was performed. The dispute was with regard to the mode of performance of the outstanding purchase transaction of the 125 Tata deferred shares. When a constituent buys shares, three ways are open to him for performing that contract. He may either take delivery on the due date, or he may enter into a cross transaction prior to the due date, or he may *badli* the transaction. In this particular case the broker's contention was that this contract of 23rd October 1947, was performed under the instructions of his constituent by entering into a cross contract. The case of the constituent was that this contract was not to be performed in the manner suggested by the broker, but was to be performed by entering into a *badla* transaction. The contract, the performance of which was in dispute, was not challenged or disputed, and that contract was the contract of 23rd October 1947. I entirely agree with Mr. Amin that if either the broker or the constituent had disputed the factum or existence of the contract of 23rd October 1947, then it would not have been open to the arbitrator to go into that question. Mr. Amin says that the transaction of 5th November is an independent transaction though in practice it results in closing the outstanding transaction of 23rd October 1947; in law these two transactions are independent transactions, and if his

client disputes the transaction of 5th November 1947, he is disputing the factum or existence of the contract of 5th November 1947. In my opinion, it is a pure question of fact to be determined upon evidence in each case whether a particular transaction is an independent transaction or is a transaction entered into in relation to a prior transaction and for the purpose of working out the prior transaction. On the evidence here and on the contentions to which I have already drawn attention, it is clear in my opinion that the transaction of 5th November 1947, was not an independent transaction but was a transaction entered into for the purpose of working out and performing the outstanding contract of 23rd October 1947.

[4] Mr. Amin has drawn our attention to three decisions of this Court which are all of single Judges and who have considered this very question that we are considering. The first is a judgment of B. J. Wadia J. reported in *Mahomed v. Pirojshaw*, 34 Bom. L. R. 697 : (A. I. R. (19) 1932 Bom. 341). In that case there was a sale by the petitioners of 700 bales of cotton of April-May 1931 delivery. The petitioners then alleged that they gave instructions to the respondents to sell a further 800 bales of cotton, but contrary to their instructions the respondents instead of selling 800 bales purchased 800 bales. The petitioner repudiated the purchase and refused to sign the contract note, and after some correspondence the respondents closed the outstanding purchase of the remaining 100 bales, the other 700 bales having been set off against the first contract of 700 bales. On these facts B. J. Wadia J. held that the dispute was with regard to the factum or existence of the contract which was denied and therefore the disputes did not arise out of or in relation to any subsisting contract. It is important to note that the case of the petitioners was that they had asked the brokers to enter into an independent transaction for the sale of 800 bales of cotton. It was not their case that the sale of 800 bales had anything whatever to do with the sale of 700 bales which was an outstanding contract. Nor does it appear that it was the case of the brokers that they had purchased 800 bales in relation to the outstanding contract of the sale of 700 bales. Therefore the dispute between the parties was with regard to the giving of instructions for entering into an independent contract, and as that independent contract was disputed, the arbitrator clearly had no jurisdiction to determine that dispute. Then we come to a judgment of Kania J. reported in *Shriram Hanutram v. Mohanlal & Co.*, 41 Bom. L. R. 1293: (A. I. R. (27) 1940 Bom. 93) and that is a judgment to the same effect as the judgment of B. J. Wadia, J., and Kania J. holds

that where the fact of the contract itself is in dispute, it was not open to the arbitrator to decide the point and the Court in normal course would refuse a stay, as what he had to consider was whether a suit should be stayed on a notice of motion having been taken out for stay. When we turn to the facts of this case, it clearly appears again that the dispute was with regard to a sale of two lots of 1,000 bales of cotton and repurchase of the same 2,000 bales. The constituent disputed that he had given any instructions for these transactions at all. Therefore the question that had to be determined by the arbitrator was whether there was a contract for sale and purchase of 2,000 bales, the very existence of which contract was denied by one of the parties. The arbitrator had clearly no jurisdiction to decide this question. It is also important to note that in this case Kania J. took the view that here was no submission in writing because all that had happened in this case was that a contract note had been sent to the other side and that contract note had been retained. The third decision is again a decision of Kania J. and that is reported in *Sukhanandan Ramdhin v. Manilal Kanhialal*, 42 Bom. L. R. 1135 : (A. I. R. (28) 1941 Bom. 82). In this case the brokers closed the outstanding transaction because on a demand being made for margin money the constituent failed to pay it, and when intimation of the closing transaction was given to the constituent, he repudiated the closing transaction. Kania J. held that mere repudiation of the closing transaction by the constituent was not a dispute as to the factum or existence of the contract in respect of which the disputes had arisen. Mr. Amin has relied on a passage in the learned Judge's judgment at p. 1138 where he says:

"It is nobody's case that instructions were given for the closing of this transaction which were carried out and the dispute is in respect of such closing."

Mr. Amin contends that if instructions had been given for closing the transaction and there had been a dispute about those instructions, then according to the view of this learned Judge an arbitrator would have had no jurisdiction to go into that question. With very great respect to the learned Judge, that question did not arise before him for determination. All that he had to consider was whether, on a transaction being closed by the broker because the margin money had not been paid and the closing was without instructions and when that closing transaction was disputed, the arbitrator had jurisdiction to decide that dispute. What the position in law would be when a transaction is closed under instructions given by the constituent and when those instructions are disputed, is a matter that did not call for a decision at the hands of the

learned Judge. The point was never argued and the learned Judge, with respect, never considered all aspects of that question. That question really now arises for our determination. Then we have the judgment of the learned Judge, from whose decision this appeal has been preferred, viz. Bhagwati J. himself, and that is reported in *Fernandez v. Jivatlal Partapshi*, 48 Bom. L. R. 678 : (A. I. R. (34) 1947 Bom. 65). This case on facts is identical with the case I have last considered, the judgment of Kania J. Here also the broker closed the transaction as large amounts were due by the constituent to him and those amounts had not been paid. There is one further judgment to which Mr. Amin has referred, and that is again a judgment of a single Judge, Crump J., reported in *Uderam v. Shivbhanjan*, 22 Bom. L. R. 711 : (A. I. R. (7) 1920 Bom. 78). That case did not consider the question of jurisdiction of the arbitrator to decide disputes with regard to disputed contracts. But Mr. Amin relies on this judgment for the proposition that even though a cross contract may be entered into in order to perform an outstanding contract, the cross contract is an independent contract and has nothing whatever to do with the earlier outstanding contract. In the case before Crump J. the question was whether a certain surety had been discharged. He had guaranteed the performance of a particular contract and that contract was a contract of purchase of 100 bales of Broach cotton. The plaintiffs, who were suing the surety in respect of this contract on hearing reports as to the financial soundness of the seller, agreed to sell to him 100 bales of Broach cotton for the same delivery, and the plaintiffs sued the surety to recover the difference between the rates of the two contracts, and the contention of the surety was that he was discharged from his suretyship by reason of the second contract. Crump J. held that the surety was not discharged because each of the contracts was capable of performance on the due date and there was no rescission of the original contract by a new agreement. It is significant to note that there is no suggestion in this case that the second contract, viz., the sale of 100 bales of cotton, was entered into pursuant to any instructions which were given for the purpose of carrying out the original contract of purchase of 100 bales, and it was on these facts that Crump J. held that the second transaction was an independent transaction and the surety was not discharged.

[5] We fail to see, in principle, what difference there can be between a case where a broker closes an outstanding transaction because no margin has been paid to him and the rules permit him to perform the outstanding contract

by entering into a cross contract and closing the outstanding contract, and a case where the broker enters into a cross contract pursuant to instructions given by the constituent. The only principle which can be deduced from these cases is that the second contract must be in performance of the first contract and must arise out of the first contract in order that the arbitrator could have jurisdiction to consider any dispute that might arise as to whether instructions were given or not with regard to the second contract. Rule 117 (a) is a submission clause in respect of any transactions and contracts, made subject to the rules of the Association or with reference to anything arising out of or incidental thereto or anything to be done in pursuance thereof. Therefore, if instructions are given in pursuance of an outstanding contract or in relation to an outstanding contract and those instructions are to close an outstanding contract, we fail to see why the contract entered into in pursuance of those instructions cannot be the subject-matter of the reference even though the instructions may be disputed by the constituent. In our opinion, therefore, the learned Judge was right when he came to the conclusion that on the facts of this case the existence or the factum of the contract was not in dispute.

[6] The second point urged by Mr. Amin that R. 117 (a) is *ultra vires* of the Association because it deals with forward contracts and under S. 5 of Bombay Act, VIII [8] of 1925 any rule which deals with the regulation and control of transactions in securities other than ready delivery contracts has to be made subject to the sanction of the Governor in Council; and it is not disputed that R. 117 (a) has not been made with such sanction. We are prepared to assume that R. 117 (a) is *ultra vires* of the Native Share and Stock Brokers' Association. But this particular rule has been made a term of the contract between the broker and the constituent. What we have now to consider is not whether the rule is *ultra vires*; that is entirely an irrelevant consideration. What we have to consider is whether, this particular rule having been made a term of the contract, such a term of the contract is binding upon the parties or not, and Mr. Amin has not suggested any reason why such a term of the contract should not be binding upon the parties. It is not suggested that such a term is against public policy or is illegal or immoral, and therefore we are of the opinion that that being made a term of the contract is binding upon the parties.

[7] The result, therefore, is that the appeal must fail and is dismissed with costs.

Coyajee J.—I agree.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 346 [C. N. 88.]

CHAGLA C. J. AND BHAGWATI J.

Yusuf H. Abbas — Appellant v. Bhagwandas P. Nangpal — Respondent.

O. C. J. Appeal No. 27 of 1948, Decided 11th March 1949.

(a) Legal Practitioner—Duty of— Counsel not to permit himself to be made instrument in hands of Judge—Civil P. C. (1908), O. 3, R. 4.

Counsel has a duty to the Judge, but he has also a duty to himself and a duty to his client and it is entirely unbecoming the dignity of the Bar for any counsel to permit himself to be made a sort of a pliable instrument in the hands of the Judge. It is not for counsel merely to watch which way the wind is blowing and then to trim his sail according to that wind.

[Para 2]

Annotation: ('44-Com.) Civil P. C., O. 3 R. 4 N. 13.

(b) Civil P. C. (1908), S. 107—Trial Court taking witnesses out of hands of counsel and examining and cross-examining them himself — Appellate Court not to attach any importance to observations about demeanour of witnesses by trial Court.

Normally, the Court of appeal attaches the greatest importance to what the trial Court says about a witness whom it has seen and which advantage the Court of appeal does not possess. But where the trial Judge took the witnesses out of the hands of counsel and examined and cross-examined them himself, any significance that might attach to the observation of the trial Court as to demeanour of witnesses is entirely lost.

[Para 2]

Annotation: ('44-Com.) Civil P. C., S. 107 N. 14.

M. P. Amin—for Appellant.

Sir Jamshedji Kanga—for Respondent.

Chagla C. J.—This is an appeal from a judgment of Desai J. and it arises out of a suit filed by a broker against his constituent to recover a sum of money due in respect of various transactions put through by the broker on the Stock Exchange. The only dispute between the parties in the suit was with regard to a transaction of 15 Bombay Dyeing shares. It would appear that on 10th December 1946, the defendant had given instructions to the plaintiff to sell these 15 Bombay Dyeing shares. The plaintiff's case was that on 2nd January 1947, the defendant gave him instructions to make a *badla* of this transaction, and pursuant thereto he purchased 15 shares on 3rd January and sold 15 shares on 7th January with the result that there was an outstanding transaction of sale of 15 shares for the settlement which ended on 16th January 1947, and as the defendant did not pay to the broker moneys that were due to him, he closed this transaction on 16th January 1947. As against this the defendant's version was that on 21st December 1946, he himself personally gave instructions to the plaintiff to close the outstanding transaction of sale of 15 Bombay Dyeing shares by a cross transaction of purchase, and, therefore, no transaction was outstanding after 21st December 1946. According to the defendant he left Bombay on 22nd December 1946, for Poona, returned to

Bombay in the second week of January, and it was then that he came to learn that his instructions had not been carried out and he made his protest to the broker. The learned Judge accepted the plaintiff's version.

[2] Now in appeal Mr. Amin for the appellant has severely criticized the manner in which this case was conducted in the lower Court, and I very much regret to say, with respect to the learned Judge, that there is considerable force in the criticism. The learned Judge seems to have taken the witnesses into his own hand and, instead of leaving counsel to discharge their functions for which they are briefed and paid, assumed to himself the duties and the obligations of counsel. Such a course has been deprecated by the highest Courts in England. The learned Judge puts himself under a handicap, because any comments that he may make on the demeanour of witnesses under these circumstances cannot carry any weight with the Court of appeal. In a striking passage Lord Greene, Master of the Rolls, in *Yuill v. Yuill*, (1945) P. 15, observed as follows (p. 20) :

"A Judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course he, so to speak descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked, as everyone who has had experience of these matters knows, that the demeanour of a witness is apt to be very different when he is being questioned by the Judge from what it is when he is being questioned by counsel, particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue."

I regret to note that in the case before us also the learned Judge definitely descended into the arena, and Mr. Amin's criticism is that his vision was clouded by the dust of the conflict. It is a matter of greater regret that counsel who appeared for the parties should not have taken the trouble to see that the record was properly completed. Mr. Amin's grievance there also is fully justified and we find several lacunae in the record as appears before us. Apparently, counsel feeling that the tendency of the Judge lay in a particular direction submitted to that tendency and did not take the trouble to ask necessary questions in examination-in-chief or in cross-examination. Counsel has a duty to the Judge, but he has also a duty to himself and a duty to his client, and it is entirely unbecoming the dignity of the Bar for any counsel to permit himself to be made a sort of a pliable instrument in the hands of the Judge. It is not for counsel merely to watch which way the wind is blowing and

then to trim his sail according to that wind. Our Bar has very great traditions and I am sure that it would never be said of this Bar that a member of it did not do his duty by his client even when he felt that the Judge was for the time being against him. After all, counsel has got to realise that the case does not necessarily end with the Judge. There is a higher Court and the higher Court may take an entirely different view of the evidence that has been led from the one that has been taken by the Court below. Therefore, in assessing the record we agree with Mr. Amin that we must discard entirely the views formed by the learned Judge as to the demeanour of witnesses. Normally, the Court of appeal attaches the greatest importance to what the trial Court says about a witness whom it has seen and which advantage the Court of appeal does not possess. But in this case, as I have pointed out earlier, in view of the fact that the learned Judge took the witnesses out of the hands of counsel and examined and cross-examined them himself, any significance that might attach to the observation of the trial Court as to demeanour of witnesses is entirely lost. We must, therefore, consider this record on its own merits and as if we ourselves were the trial Court. It is a great handicap for the Court of appeal to put itself into the position of the trial Court, but unfortunately the learned Judge has left us no other option but to do it. [The rest of the judgment is not material to this report.]

[3] **Bhagwati J.** — I fully associate myself with the observations made by my Lord the Chief Justice as regards the conduct of the case in the lower Court, both by the learned Judge and the counsel concerned in the case. On a perusal of the record it appears that the learned Judge entered into the arena and both the counsel appear to have allowed themselves to fade into insignificance with regard to the conduct of the case. Counsel for the defendant apparently seems to have lost heart. Counsel for the plaintiff thought that he was quite safe in leaving the cross-examination of the witnesses on behalf of the defendant into the safe hands of the learned Judge. The result was that there were various lacunae in the examination of the various witnesses who were examined on behalf of the plaintiff as well as the defendant, which were pointed out before us by Mr. Amin for the appellant and also to a certain extent admitted by Sir Jamshedji Kanga for the respondent. I fully endorse what has been stated by my Lord the Chief Justice with regard to the duties which counsel owe to the Court, to themselves, as well as to the clients for whom they are briefed, and it would be presumptuous on my part to add to what has been already observed in that behalf.

The only thing which one may say is that the conduct of the case left much to be desired and at one stage we actually made an offer, in view of the state of the record, to Mr. Amin for the appellant that if his client felt that any injustice was done to his case the matter may be remanded by us to the Court below for the purpose of a retrial. For obvious reasons Mr. Amin for the appellant did not avail himself of the offer and we, therefore, have decided the appeal on the record as it stands before us. On the merits I have nothing to add to what has been already observed by my Lord the Chief Justice in the judgment just delivered. I agree with the conclusions reached by him and agree that the appeal should be dismissed with costs.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 348 [C. N. 89.]

CHAGLA C. J. AND BHAGWATI J.

Nagarmal Surajmal, a firm — Plaintiffs — Appellants v. Gotulal Laxminarayan — Defendant — Respondent.

O. C. J. Appeal No. 38 of 1948, Decided on 11th March 1949.

Bombay Agricultural Debtors' Relief Act (XXVIII [28] of 1947), Ss. 1 (2), 2 (3), 19 — S. 19 applies to Original Side of High Court—Expression 'City of Bombay' in S. 1 (2) not to be applied to Courts in City of Bombay but to people residing in City of Bombay—Court in Bombay not to dismiss suit but to transfer same to Court having jurisdiction under S. 19.

The words of S. 19 are wide enough and general enough to apply to the Original Side of the High Court as well as to the other civil and revenue Courts in the Province. Therefore S. 19 (1) expressly ousts the jurisdiction of the Original Side of the High Court to try those matters which involve the question mentioned in S. 19 (1). The expression "City of Bombay" in S. 1 (2) is not to be applied to the Court in the City of Bombay but to the people residing in the City of Bombay. This exception only means that if there is an agriculturist ordinarily resident in the City of Bombay, then he would not be entitled to the benefits and privileges of the Act. It certainly does not mean that although an agriculturist may ordinarily reside in a part of the Province to which the Act applies, he would still not be entitled to the benefits and privileges of the Act merely because his creditor chooses to file a suit against him on the Original Side of the High Court of Bombay. [Para 3]

The Original Side of the High Court has undoubtedly jurisdiction to entertain the suit, but it has no jurisdiction to try the issues which will determine whether the party is entitled to the benefit of the Act or not. If he fails to satisfy the Court that he is a debtor within the meaning of the Act the proceeding will come back to the Original Side. If he succeeds in establishing that he is a debtor then further proceedings will have to be taken as laid down in the Act. Hence the proper order for the Judge of the Original Side of the High Court is not to dismiss the suit but to transfer the same to the Court having jurisdiction: A.I.R. (36) 1949 Bom. 304, *Disapproved*. [Para 4]

S. A. Desai — for Appellants.

J. S. Dawda — for Respondent.

Chagla C. J. — This is an appeal from an order of Coyajee J. dismissing a summons for judgment taken out by the plaintiffs on the ground that this Court had no jurisdiction to try the suit. The defendant against whom the summons was taken out contended that he was a resident of Chalisgaon, that he was a debtor within the meaning of Act XXVIII [28] of 1947, and, therefore, this Court had no jurisdiction to try this suit.

[2] Mr. Desai on behalf of the plaintiffs has argued before us that in view of the fact that Act XXVIII [28] of 1947 is not applicable to the City of Bombay, and this suit having been filed on the Original Side of the High Court, this Court had jurisdiction to try the suit notwithstanding the fact that the defendant might be a debtor within the meaning of the Bombay Agricultural Debtors' Relief Act. Turning to the scheme of the Act, it is clear that the Act was enacted for the purpose of giving relief to agricultural debtors in the Province of Bombay, and one exception that was made by S. 1 (2) was that although the Act was made applicable to the whole of the Province of Bombay it did not apply to the City of Bombay. Under S. 19 of the Act:

"All suits, appeals, applications for execution and proceedings other than revisional in respect of any debt pending in any civil or revenue Court shall, if they involve the questions whether the person from whom such debt is due is a debtor and whether the total amount of debts due from him on the date of the application exceeds Rs. 15,000, be transferred to the Court."

And the Court to which these suits, appeals and applications are to be transferred is defined in the Act itself, and the Court is, for the purposes of this Act, the Court of the Civil Judge, Senior Division, having ordinary jurisdiction in the area where the debtor ordinarily resides, and if there is no such Civil Judge, the Court of the Civil Judge, Junior Division, having such jurisdiction. Therefore, the Court set up for the purposes of this Act, as far as this particular defendant is concerned, would be the Court of the Civil Judge, Junior Division, at Chalisgaon, and this Court has to try certain preliminary issues as laid down in S. 17 of the Act, and these preliminary issues are:

"(a) Whether the person for the adjustment of whose debts the application has been made is a debtor?"

"(b) Whether the total amount of debts due from such person on the date of the application exceeds Rs. 15,000?"

Now, there is no warrant for suggesting that the civil or revenue Courts referred to in S. 19 do not include the Original Side of the High Court. Section 19 is general in its terms and it

precludes any civil or revenue Court from continuing with any proceeding pending before it, if such a proceeding involves the question whether the person from whom a debt is due is a debtor and also the question as to what the total amount of debt is. The object of the Legislature was that both these questions should not be determined by the ordinary civil and revenue Courts in the Province, but by the Special Courts set up under this Act, and as far as the defendant is concerned, as I pointed out earlier, that Special Court is the Court within whose jurisdiction he ordinarily resides, and he residing ordinarily at Chalisgaon, that Court would be the Court of the Civil Judge, Junior Division, at Chalisgaon.

[3] Now, our attention has been drawn to a judgment of Desai J. which he delivered on 22nd July 1948, *Juharimal Senaji v. Liladhar*, 51 Bom. L. R. 485 : (A. I. R. (36) 1949 Bom. 304) holding that notwithstanding Act XXVIII [28] of 1947 and notwithstanding the contention taken up by the defendant that he was a debtor within the meaning of that Act, the Original Side of the High Court had jurisdiction to try such a suit. The learned Judge took the view that as there was no provision in this Act expressly ousting the jurisdiction of the High Court, it must be held that the jurisdiction of the High Court was not affected by Act XXVIII [28] of 1947. In my opinion, the words of S. 19 are wide enough and general enough to apply to the High Court as well as to the other civil and revenue Courts in the Province, and, therefore, I read S. 19 (1) as in fact expressly ousting the jurisdiction of this Court to try those matters which involve the questions mentioned in that sub-section. Therefore, the only proper interpretation to give to the expression "City of Bombay," as it occurs in S. 1 (2), is not to apply it to the Courts in the City of Bombay but to the people residing in the City of Bombay. This exception only means that if there is an agriculturist ordinarily resident in the City of Bombay, then he would not be entitled to the benefits and privileges of Act XXVIII [28] of 1947. It certainly does not mean that although an agriculturist may ordinarily reside in a part of the Province to which the Act applies, he would still not be entitled to the benefits and privileges of this Act merely because his creditor chooses to file a suit against him on the Original Side of the High Court of Bombay.

[4] The learned Judge has dismissed the summons for judgment. With respect to him, it was clearly erroneous because all that S. 19 lays down is that the suit should be transferred to the Court specified in the Act for the purpose of the trial of the two preliminary issues. This Court has

undoubtedly jurisdiction to entertain the suit but it has no jurisdiction to try those two preliminary issues which will determine whether he is entitled to the benefit of the Act or not. It may be that he may fail to satisfy the Chalisgaon Court that he is a debtor within the meaning of the Act. In that case the proceedings will come back to this Court. If, on the other hand, he succeeds in establishing that he is a debtor as contemplated by the Act, then further proceedings will have to be taken as laid down in the Act. Therefore, the proper order that the learned Judge should have made was to transfer the suit which has been filed here to the Court of the Civil Judge, Junior Division, Chalisgaon.

[5] We would, therefore, set aside the order made by the learned Judge and order that there will be no order on the summons except that the suit be transferred to the Civil Judge, Junior Division, at Chalisgaon. Costs of the summons, costs of the suit, and costs of the appeal to be costs in the cause.

[6] Liberty to the plaintiffs' attorneys to withdraw the sum of Rs. 500 deposited by them in Court for costs of the appeal.

[7] *Bhagwati J.*—I agree. The Act was enacted for the specific purpose of giving relief to the agricultural debtors in the Province of Bombay and for certain other purposes specified in the Act. The extent of the Act was defined over the whole of the Province of Bombay except the City of Bombay. What the Legislature meant by the words "except the City of Bombay" has given rise to this controversy, which has been raised before us, whether they apply to debtors ordinarily residing in the City of Bombay or to the Courts situate in the City of Bombay. The words "except the City of Bombay" are capable of these two constructions, but what construction is right would have to be determined having regard to the object and intendment of the Act itself. The object, as it is to be gathered from the preamble, is that the agricultural debtors in the Province of Bombay have got to be relieved. The object, therefore, of the Act is that those persons who enjoy the status of being agricultural debtors in the Province of Bombay have the provisions of the Act enacted for their benefit, and, therefore, it stands to reason that apart from other considerations, the exception which is made with regard to the City of Bombay being excluded from the operation of the Act should be with reference to debtors who are ordinarily residing in the City of Bombay. The other construction which has been contended for on behalf of the appellants would lead to an absurd result. If there were debtors ordinarily residing in the Province of Bombay except the City of

Bombay, then the result would be that even in the case of those debtors who would be entitled to the benefit of the provisions of the Act, they would be deprived of those benefits in those cases where it were possible by having resort to the provisions of cl. 12, Letters Patent to file suits against them in the High Court of Bombay. That could never have been the intendment of the Act which is mainly for the relief of the agricultural debtors in the Province of Bombay. The provisions of the Act which have been referred to in the judgment just delivered by my Lord the Chief Justice also lend support to that construction. The Courts which have got to be set up for the adjustment of debts are the Courts which are defined in S. 2 (3) of the Act and they also have reference to the debtors ordinarily residing within their jurisdiction. It could not have been intended by the Legislature that the civil or revenue Courts which are referred to in S. 19 of the Act have got to be the civil or revenue Courts in the Province of Bombay except those which are situated in the City of Bombay. The words are wide enough to cover even the High Court which would have jurisdiction by virtue of cl. 12, Letters Patent. The only determinative factor is where the debtor ordinarily resides. If the debtor ordinarily resides within the Province of Bombay except the City of Bombay, then the High Court which would have jurisdiction to entertain a suit against the debtor by virtue of cl. 12, Letters Patent would also have to transfer, by reason of the enactment of S. 19 of the Act the proceedings which fall within S. 19 (1). It is only in those cases where the debtor ordinarily resides in the City of Bombay that there being no Court established for the purpose of the adjustment of debts the jurisdiction of the Court would be saved by reason of the enactment of S. 1 (2) of the Act. I, therefore, agree with the order which has been proposed in the judgment of my Lord the Chief Justice.

D.H.

Order accordingly.

A. I. R. (36) 1949 Bombay 350 [C. N. 90.]
DESAI J.

Himatlal Jamnadas Dani and others — Plaintiffs v. Birbhangirji Bisheshargirji — Defendant.

O. C. J. Suit No. 3639 of 1947, Decided on 27th November 1947.

Hindu law — Custom — Ascetic — Dungle Gosawee — Alienation — Property devolves from Guru to Chela—Chela inherits absolutely and can alienate in any manner property inherited from preceptor—Property is not impressed with trust of any sort: O. C. J. Suit No. 1094 of 1941 (Bom.), *Ref.*
[Para 8]

M. L. Maneksha — for Plaintiffs.

V. F. Taraporewala — for Defendant.

Judgment. — By an agreement in writing dated 16th January 1947, the defendant agreed to sell to the plaintiffs the land, hereditaments and premises situate at Vithalbhai Patel Road, Bombay, at or for the price of Rs. 2,25,000. On or about 17th July 1947, the plaintiffs' attorneys served requisitions on the vendor's title and the defendant's attorneys answered the said requisitions on or about 8th August 1947. The answers to the material requisitions are set out in paragraphs 5 to 9 of the plaint which it is not necessary for me to set out in detail in this judgment. The plaintiffs submit that doubts have arisen as to whether there is a custom, as alleged by the defendant, by which the defendant has full and absolute right and authority to sell or dispose of the property agreed to be sold and that his *chela* or disciple has no right or interest in the said property and is not entitled to challenge alienation of the said property by the defendant. The plaintiffs further submit that doubts have arisen whether the said alleged custom is sufficiently and satisfactorily proved and established by reason of the judgment of the Honourable Chagla J., in *Nazlibai v. Birbhangir Raja Vishveshargir*, O. C. J. Suit No. 1094 of 1941 decided on 3rd October 1941 and by the evidence referred to in answers to the said requisitions.

[2] By reason of the said doubts the plaintiffs have taken out this originating summons to decide the following questions:

(1) Whether the defendant has made out a marketable title to the property agreed to be sold and referred to in para. 1 of the plaint free from all reasonable doubts? (2) Whether the requisitions of the plaintiffs in respect of the defendant's title to the said property have been sufficiently and satisfactorily answered by the defendant? (3) Whether the plaintiffs are bound to accept the defendant's title to the said property and to purchase the same? (4) If any of the said questions (1), (2) and (3) be answered in the negative, whether the defendant is bound to refund and pay to the plaintiffs the sum of Rs. 12,500 deposited as and by way of earnest money by the plaintiffs with the defendant and to pay to the plaintiffs all costs, charges and expenses incurred by the plaintiffs in preparation of the said agreement for sale dated 16th January 1947, and the investigation of title, advertisements, *battali* correspondence etc.? (5) What provision should be made for costs of this suit?

[3] Now it is common ground that the defendant is a Dungle Gosawee. In his book called the Law and Custom of Hindu Castes Mr. Steele has this to say about this particular community at p. 441, para. 31. According to Mr. Steele, the Gooroo in the case of Dungle Gosawees may sell or mortgage the muth in which he presides, and his act is confirmed by the disciples, who generally redeem it. Sir Dinshah Mulla in his book on Hindu Law at p. 74, para. 58, points

out that in the case of an ascetic (sanyasi) a virtuous pupil is the heir of the sanyasi.

[4] In *Nazlibai v. BIRTHANGIR Raja Vishweshwargir*, O. C. J. Suit No. 1094 of 1941 decided by Chagla J., on 3rd October 1941 the question arose in reference to an agreement of sale entered into by the defendant in this suit with the plaintiff in that particular suit as regards a certain property situate at the corner of 2nd Bhatwady and Girgaum Road. An originating summons was taken out in that suit also for a decision whether the defendant had made out a marketable title, and Chagla J. came to the conclusion that a marketable title was made out. The contention was that the title was based on a custom prevalent in Hyderabad applicable to the community, viz., the Dungle Gosawee Hindus, to which the defendant belonged. The custom alleged was that the Gosawees do not marry and the property devolves upon the disciple of the particular person who owns the property. The defendant claimed to be the sole disciple of Raja Vishweshwargir and as such he claimed to inherit all his property. The learned Judge said this:

"It is the defendant's contention that the Gosawis are a secular sect, that they are not attached to any Muths, that they are the absolute owners of the property which they inherit, that they do business and that they buy and sell property as absolute owners and that the property that he inherited from his preceptor was not impressed with any trust of any sort whatsoever."

The learned Judge upheld those contentions. For coming to that conclusion Chagla J. relied on the will made by Raja Rameshwargir who was the preceptor of Raja Vishweshwargir and the proceedings which took place in the Hyderabad Court in connection with obtaining a succession certificate. One Bansigir Chela Ghanshamgir, who was a landlord of Hyderabad (Deccan) and who belonged to the same community as the defendant, was called as a witness, and he deposed to the custom set out above. On that evidence his Lordship came to the conclusion that the custom was proved and a marketable title was made out.

[5] In this case the plaintiffs are willing purchasers, but they felt some doubts whether the evidence which was called in *Nazlibai's case*: (O. C. J. Suit No. 1094 of 1941), was sufficient to justify the finding that the custom pleaded was proved. In order to bring satisfaction to the mind of the plaintiffs and to leave no room for doubt as regards the defendant's right to sell the property in suit, the defendant has called before me one Dilaramgir. He deposed that one Mukundgir was the *chela* of the defendant, and Mukundgir adopted the witness as his *chela*, that Mukundgirji died about eleven years ago and ever since his adoption as *chela* by Mukund-

girji the witness has been living with the defendant and that the defendant had consented to the adoption of the witness by Mukundgirji, and after the death of Mukundgirji the defendant accepted the witness as his *chela* and that the defendant had no other *chela*. He deposed to the custom of the community according to which the defendant has the right to sell or mortgage the properties. He also deposed to the fact that the properties were not held on trust but belonged absolutely to the Gooroo. According to the custom prevailing in the community, the witness disclaimed any interest in the properties in suit and admitted the right of the defendant to sell off these properties and to the enjoyment of the income thereof for his own personal use. The witness said that prior to the transaction in suit, the defendant had sold other properties as the absolute owner thereof both in Hyderabad (Deccan) and in Bombay. In cross-examination by Mr. Maneksha the witness said that the defendant had got no other *chela*.

[6] Mr. Taraporewalla for the defendant tendered in evidence as Ex. 1 the plaint and the proceedings and the judgment in *Nazlibai's case*: (O. C. J. Suit No. 1094 of 1941) referred to above.

[7] The object of calling Dilaramgir as a witness was that assuming that the property was property held on trust, Dilaramgir being the *chela* himself was the only person entitled to resist alienation by the defendant. He, however, has disclaimed by his evidence any interest in the property and, therefore, there is no danger of the title of the plaintiffs being challenged by anyone interested in the property.

[8] On the evidence before me I have come to the conclusion that the custom is proved and that the defendant is the absolute owner of the property in suit and that he has got the right to sell this property.

[9] Costs to be costs in the sale.

R.G.D.

Order accordingly.

A. I. R. (36) 1949 Bombay 351 [C. N. 91.]

DESAI J.

Bhagwandas Ranchoddas Modi and another
— *Plaintiffs v. Natwarlal Maganlal Mehta*
— *Defendant.*

O. C. J. Suit No. 1192 of 1945, Decided on 6th October 1947.

(a) Trusts—Foreign trust — Suit — Defalcations by trustee in Indian Union — High Court can in its original jurisdiction entertain suit for accounts and compel trustee to restore original property as also property which is result of sale proceeds — Letters Patent (Bom), Cl. 12 — Civil P. C. (1908), S. 92.

A suit against a trustee for accounts of his management of the trust property belonging to a charity to be administered in a foreign State is a suit which the

High Court in India in the exercise of its original jurisdiction can try. The High Court can compel a trustee who has made defalcations to restore the original trust property as also property which is not the original trust property but is the result of its sale proceeds. It has jurisdiction to order accounts to be taken and to order payment of moneys due at the foot of that account, so that the moneys belonging to the trusts are recovered and preserved, the Court making not the slightest attempt to determine how that property is to be administered. The administration of that property must be left to the foreign Court in whose jurisdiction that property is situate : A. I. R. (29) 1942 Bom. 208 and A.I.R. (31) 1944 P.C. 39, *Rel. on.*

[Para 14]

The fact that the trust property was lost or misappropriated makes no difference : A.I.R. (19) 1932 Cal. 444, *Dissent.*

Quære :—Whether Court has jurisdiction to remove a trustee.

[Para 15]

Annotation: ('44-Com.) Civil P. C., S. 92 N. 2 and 38.

(b) Civil P. C. (1908), O. 2, R. 3 — Suit against same defendant as trustee, for accounts—Leave of Advocate-General obtained — Several charities involved—Suit is not bad for multifariousness.

A suit against a trustee for accounts of the trusts, with the consent of the Advocate-General is in substance the Advocate-General's suit, whose duty it is to protect charity moneys, whether belonging to one charity or several charities and when the suit is against the same defendant, it is not bad for multifariousness because it is in respect of several charities.

[Para 16]

Annotation : ('44-Com.) Civil P. C., S. 92 N 9; O. 2, R. 3 N. 6.

(c) Trusts — Suit for accounts by plaintiff not as co-trustee but as relator, with sanction of Advocate-General under S. 92—In such suit there is no question of set-off or counter-claim by defendant — Defendant cannot plead that plaintiff was as much responsible for loss of trust funds, as defendant—Civil P. C. (1908), S. 92.

[Para 17]

Annotation: ('44-Com.) Civil P. C., S. 92 N. 2 and 7.

M. P. Amin and C. K. Daphtary, Advocate-General
— for Plaintiffs.

K. K. Desai and S. T. Desai — for Defendant.

Judgment.—The plaintiffs have brought this suit against the defendant for an order that the defendant may be directed and ordered to render a true and complete account of his management of the trusts referred to in the plaint and of the trust securities and proceeds thereof and interest of the securities and all other trust monies on the footing that the defendant is guilty of misappropriating the funds belonging to the said trusts. That is prayer (a) of the plaint. Prayers (b), (c) and (d) are ancillary to that prayer. Prayers (e), (f) and (g) refer to interim reliefs. Prayer (h) is in these terms :

"That the amount due and payable by the defendant to the plaintiffs as trustees with interest may be ascertained and declared and that the defendant may be ordered to pay to the plaintiffs such sum as may be found due, and to make good to the plaintiffs all sums and the value of securities misapplied or appropriated by him."

Prayer (i) says that the defendant may be removed from his office as a trustee of the said trusts.

[2] It appears that one Devkorebai, widow of Thaker Damoder Laxmidas, made a will dated 14th October 1891. Under the provisions of that will, she directed that diverse sums should be set apart for the benefit of the charities mentioned in that will. One of such charities was to be at Mundra in Kutch where a temple was to be built wherein the "Thakorji" was to be installed, and there are provisions in the will as regards expenses in connection with the worship of the "Thakorji" and for the outlay in connection with the installation of the "Thakorji." Bai Devkorebai by her will also provided for three other trusts; one in respect of a sadavarat at Bet Dwarka, another for a dharmashala at Sidhpur and a third in respect of a sadavarat and dharmashala at Giriraj Hill. Mr. M. P. Amin tells me that Giriraj Hill is near Muttra. Mr. K. K. Desai tells me that it is in the Bharatpur State. The case, however, has been argued before me on the footing that Giriraj Hill is in the Bharatpur State.

[3] The plaintiffs and the defendant in course of time became the trustees of the four trusts. It appears that their predecessors-in-title, the retiring trustees, executed four separate deeds of appointment of new trustees in respect of the said four trusts. The four deeds related to securities of the value of Rs. 22,000, Rs. 21,000, Rs. 12,000 and Rs. 21,500 along with different amounts of cash in hand which belonged respectively to the four trusts.

[4] It is the plaintiffs' case that they were very greatly under the influence of the defendant in whom they had complete confidence and that they allowed the defendant to be in sole charge and management of the trust properties. The plaintiffs say that it was in or about May 1945 that they for the first time discovered that the defendant had grossly betrayed their trust and committed breaches of trusts in respect of the trust securities and moneys and that he had embezzled the same for his own purpose. The plaintiffs have brought this suit with the sanction of the Advocate-General and prayed for the reliefs which I have set out herein above.

[5] The defendant has filed his written statement. It is admitted in that written statement that there were securities of the total face value of Rs. 77,000 belonging to the four trusts. The defendant says that to the knowledge of the plaintiffs all the said securities which were lying in the safe custody accounts had been withdrawn from time to time by the defendant at the instance of the plaintiffs themselves and either deposited as security in the overdraft account and/or sold for the purpose of payments of the amounts drawn from the overdraft account and/or the debts or purposes of the plaintiff.

The defendant denies that he had operated upon the safe custody accounts or the current accounts or the overdraft account for his own purpose as suggested except for small amounts used for Harnath Mission. He says that all the accounts were operated upon for the purpose of payment of the debts of plaintiff 1 and/or for the purpose of the trusts. That, in substance, is the only defence on the merits that the defendant has got to raise.

[6] The defences of the defendant are indicated by the issues which were raised at the hearing and which read as follows:

(1) Whether this Honourable Court has jurisdiction to try this suit?

(2) Whether the suit is bad for multifariousness?

(3) Whether the plaintiffs are entitled to maintain the suit?

(4) Whether there were any books of accounts of the four trusts mentioned in the plaint?

(5) Whether the defendant kept in his possession cheque book, the slip books, the pass book or any books of account of the said trusts as alleged in the plaint?

(6) Whether the plaintiffs agreed to remunerate N. D. Sankalia as mentioned in para. 9 of the written statement?

(7) Whether the securities of the value of Rs. 21,500 and Rs. 35,000 and Rs. 14,500 and Rs. 8,000 belonging to the said four trusts were withdrawn from the safe custody accounts at the request of the plaintiffs and thereafter dealt with for the purposes of the plaintiffs according to their instructions?

(8) Whether the plaintiffs agreed to repay and replace the amounts used out of the amount raised by pledge and sale of the said securities?

(9) Whether the defendant withdrew the said securities and/or dealt with them thereafter for his own purposes?

(10) Whether the plaintiffs are bound to pay to the defendant the amount that may be necessary to replace the said securities and/or the amount that is ascertained and declared to be due and payable by the defendant to the trusts mentioned in the plaint?

[7] From the very beginning I was of the opinion that practically all the issues commencing from issue 4 were irrelevant especially in the view I took of the nature of the suit.

[8] I shall now consider the issues in the order in which they were raised. There was no evidence, either oral or documentary, which was led before me. Mr. K. K. Desai has argued his case with conciseness and ability and laid great stress on the fact that the charities with which the plaint deals are all foreign charities to be administered in foreign States. It was practically after the arguments were over that on my inquiring of Mr. Amin he stated that Giriraj Hill was not in a foreign State. In the view that I take of the law on the subject, it does not make a difference whether Giriraj Hill is or is not in British India.

[9] Mr. K. K. Desai's argument is that the suit by itself, so far as this particular issue is concerned, is divided into two parts—one relating to the taking of accounts and the other

relating to the removal of the defendant from his office as a trustee of the said trusts. It is conceded that the suit is filed by the plaintiffs with the sanction of the Advocate-General and it is a suit under S. 92, Civil P. C.

[10] As regards the prayer for the removal of the defendant from his office as a trustee, Mr. K. K. Desai informs me that his client tendered his resignation as a trustee before the suit was filed and that he does not wish to claim to be a trustee any longer. On that, the consideration of the prayer for removal—and the consideration of the plaintiffs' right at the date of the suit to claim relief in terms of prayer (i) of the plaint—does not survive for consideration. I asked Mr. K. K. Desai whether, assuming that this Court had no jurisdiction to grant a decree in terms of prayer (i) of the plaint, i. e., for the removal of the defendant as a trustee, his contention was that the suit as a whole failed. I understood him to say that that was not going to be his contention. In any event I hold that that is not the position in law. Even if there had been no resignation on behalf of the defendant and if I came to the conclusion that this Court had no jurisdiction to pass a decree in terms of prayer (i) of the plaint, I would have proceeded to consider the claim for accounts as formulated on behalf of the plaintiffs. Mr. M. P. Amin on behalf of the plaintiffs argues that the Court has jurisdiction to order removal of a trustee of a charity to be administered in a foreign country for misappropriating the trust funds lying within the jurisdiction of this Court. I shall however, proceed first to consider what is the position in law as regards a suit for the taking of accounts of moneys lying or which were originally lying within the jurisdiction of this Court and which have been misappropriated and which moneys were to be held for the benefit of a foreign charity.

[11] The following text-books were cited before me. Mr. K. K. Desai cited Dicey on the Conflict of Laws, fifth edition, p. 203, R. 53, sub-r. (3) and the notes under that sub-rule at p. 205 and Illustration No. 7 appearing at p. 206. At p. 203, R. 53, sub-r. (3), is cited which states (what is considered to be the law in British India too):

53. "Subject to the Exception hereinafter mentioned, the Court has no jurisdiction to entertain an action for....."

(3) the administration of a foreign charity under the supervision of the Court, or the settlement of a scheme for such a charity."

[12] Mr. M. P. Amin referred me to Halsbury 2nd Edn., vol. IV, p. 212, para. 304, which states *inter alia* that the Court may appoint new trustees for the administration of a foreign charity. He also cited p. 319, para. 528 and 529, as justifying the prayer for removal of the defendant in the present case.

[13] In *Shivnarayan Sarupchand v. Bilasrai Juharmal*, 44 Bom. L. R. 466: (A. I. R. (29) 1942 Bom. 208) our Appeal Court held that the administration of a charity depends upon the law, and is controlled by the Court of the country where the charity is conducted, and that the High Court of Bombay has no jurisdiction to remove trustees of a charity functioning in an Indian State and to appoint new trustees. It is there stated:

"Where, however, immoveable property belonging to a charity in an Indian State but situate within the jurisdiction of the High Court is being misapplied, the High Court can interfere to protect that property by granting an injunction restraining misappropriation of the property or by appointing a receiver to hold the property subject to the orders of the Court having jurisdiction to administer the charity."

This case went up to the Privy Council, and their Lordships of the Privy Council by their judgment in *Bilasrai Joharmal v. Shivnarayan Sarupchand*, 46 Bom. L. R. 518: (A. I. R. (31) 1944 P. C. 39), upheld the decree of the Appeal Court which had reversed the judgment of the trial Judge. Sir George Rankin at page 520 observes as follows :

"The learned trial Judge refused to apply the principle that he ought not to interfere in the administration of a charity which is carried on within the borders of an independent State. He appears to have accepted as well settled the rule that if the Court is not in a position to supervise the carrying out of a charity it will not frame a scheme in respect of that charity but will take such steps only as are necessary to safeguard such trust funds as lie within the jurisdiction."

His Lordship says (p. 521):

"It does not appear that any objection was taken at the trial to the jurisdiction under cl. 12 of the High Court's Letters Patent, and their Lordships are satisfied that there was no defect of jurisdiction in that sense. As a Court of Equity acts *in personam* it may and some times does exercise its jurisdiction over trustees and others in respect of foreign land and otherwise in connection with rights to property situated abroad. The question here, however, is as to the principles which the Court will observe in taking upon itself to interfere with the administration of a charity when that charity has to be conducted in a foreign country and the Court is for that reason in no position to supervise its administration effectively. That the Court will protect and preserve the funds of the charity by the exercise of its jurisdiction over the trustees or other persons is very certain. But the proper conduct of the charity and the giving of any necessary directions for that purpose are another matter. In this case the Court was asked to make an order which affected the administration of the charity at every point—namely an order for the removal of the persons who were conducting the management of the hospital.... Once it is admitted that part of the cause of action arose within the jurisdiction so as to satisfy the requirements of Cl. 12, Letters Patent, no great importance attaches to the place where the trust was created or its money invested, if there is no question of preserving or recovering its property and if the only question is as to the country whose Courts should supervise the conduct of the charity and the application of its funds. The jurisdiction of the Court to remove trustees, as Lord Blackburn said... 'is merely ancillary to its principal duty, to see that the trusts are properly executed'."

[14] Now I asked Mr. K. K. Desai and Mr. M. P. Amin whether there was any authority which deals specifically with the question whether a suit against a trustee for accounts of his management of the trust property belonging to a charity to be administered in a foreign State is a suit which this Court could or could not try, and they told me that there was no direct authority on the point. Mr. K. K. Desai admitted that the Court would have jurisdiction if the suit was for the recovery of a specific property existing at the date of the suit. He, however, has maintained, and if I may say so strenuously maintained, that the suit for accounts and the payment of moneys due at the foot of the accounts, as also a suit to recover property which was not the original property but was a result of that original property, it having been converted into the shape which it retained at the date of the institution of the suit, was a suit which had to be decided on the same principles which govern suits relating to the administration of foreign charities. He said that in respect of moneys misappropriated this Court had no jurisdiction to order accounts and thereafter payment if the moneys were held by the trustee for the benefit of a foreign charity. I regret I am unable to accept that argument. In my opinion this Court in the exercise of its jurisdiction will compel a trustee who has made defalcations to restore the original trust property as also property which is not the original trust property but is the result of its sale-proceeds. I hold that this Court has jurisdiction to order accounts to be taken and to order payment of moneys due at the foot of that account, so that the moneys belonging to the trusts are recovered and preserved, the Court making not the slightest attempt to determine how that property is to be administered. The administration of that property must on well-established principles of law be left to the foreign Court in whose jurisdiction that property is situate. Mr. K. K. Desai argued that the case is governed by S. 92, Civil P. C. and not by cl. 12, Letters Patent. He cited Mulla's Civil Procedure Code, p. 327, where it is stated that S. 92 overrides cl. 12, Letters Patent (see *Padampat Singhania v. Narayandas Jhunghunwalla*, 59 Cal. 357 : (A. I. R. (19) 1932 Cal. 444). Mr. K. K. Desai argued that S. 92 contains the words "the subject-matter of the trust is situate." He argued that if the trust property was lost or misappropriated the Court had no jurisdiction. I do not agree with that proposition.

[15] That being my view, I answer the first issue in the affirmative, in so far as it relates to the question of accounts. So far as the removal of the trustees is concerned, the true test seems

to be whether such a removal is necessary for the preservation of the trust property. It may be that the appointment of trustees as well as the removal of trustees may be necessary for the purpose of the preservation of the trust property belonging to a foreign charity. If that is the correct principle, it may well be argued that the removal of the defendant in this case was a matter which fell within the jurisdiction of this Court. Looking, however, to the importance of the question involved and the fact that this question might have been argued at greater length before me, I do not propose to give any direct finding on that issue. I will rest myself content with the observation that it is unnecessary for me to pass a decree for the removal of the defendant as a trustee as he does not claim to be a trustee. That disposes of the two questions involved in issue 1 which were argued before me.

[16] As regards issue 2, Mr. K. K. Desai argues that the suit is bad for multifariousness because there are four charities involved in the suit and the accounts of four different charities will have to be taken. In my opinion, this is in substance the Advocate-General's suit, whose duty it is to protect charity moneys, whether belonging to one charity or several charities, and it is against the same defendant. I, therefore, hold that there is no multifariousness, and I answer that issue in the negative.

[17] So far as issue 3 is concerned, it was argued that on the facts of the case the plaintiffs were as much, if not more, to be blamed for the loss of the trust funds and that the plaintiffs being parties who were themselves liable to account could not call upon the defendant to render an account nor could they call upon the defendant to pay the moneys due at the foot of that account to the plaintiffs, which it was alleged the plaintiffs themselves had misappropriated, and that the plaintiffs in their personal capacity were the last persons who could ask for a decree for the removal of the defendant from his office as a trustee of the trusts. There would be considerable force in this argument if I was of the opinion that this suit was a suit by the plaintiffs in their personal capacity as trustees seeking for an account. It is conceded that a suit for accounts would lie at the instance of one trustee against another where there was misappropriation of trust moneys, irrespective of S. 92, Civil P. C. This, however, is not the nature of the suit. It is a suit, as I have said before, by the plaintiffs as relators brought with the sanction of the Advocate-General under S. 92, Civil P. C. In such a suit, there is no question of a set-off or a counterclaim by the defendant. It is the charity who is suing the defendant as one of the trustees

and it says: "You have misappropriated charity funds or are responsible for such misappropriation or loss of charity moneys. Make them good. I am not concerned with your rights against your co-trustees."

[18] At the very commencement of the hearing of this suit the Advocate-General appeared with Mr. M. P. Amin and I asked him why it was that the plaintiffs instead of being the defendants in the action had been allowed to institute this suit as relators with the sanction given by the Advocate-General under S. 92. He told me that there were valid reasons and he had fully considered the question. As I hold the defendant liable for the loss of the charity moneys, I direct him to render accounts and to make good to the trust estate the full amount that has been lost to the trusts. I will not say who is at fault, and nothing that I say shall be construed as absolving the plaintiffs in the slightest degree from any liability, civil or even criminal, that they might have incurred towards the charity or otherwise. I keep only one aspect of the case before my eyes, and it is this. Is it open to a trustee to say: "No doubt trust moneys are lost. I should have seen to it that they were not lost or were not misappropriated. Instead of that, I stood by and saw them being misappropriated and helped in the making of that misappropriation possible. I am not to be held liable because my co-trustee is more guilty than I am." I am afraid the position is far too clear in law and that the defendant is clearly liable to the charity, and that is the only point that I am deciding. I leave intact and untouched by anything that I have said before the defendant's rights against the plaintiffs in their personal capacity.

[19] This is a shocking case. The plaintiffs, well-to-do people, who accepted responsibilities of a serious nature as trustees, have, by their own plaint, disclosed a total failure to appreciate those responsibilities, and they throw the blame for the substantial if not the total loss of the trust estate on their co-trustee on the allegation that the defendant betrayed the trust and the confidence which they reposed in him not only in the matter of trust securities but their own personal properties. The defendant turns round on his colleagues and makes a very grave charge of misappropriation against the plaintiffs. With the merits or demerits of that controversy, I am fortunately not concerned. I hold that the suit is maintainable and I must decide the issue in favour of the plaintiffs and in the affirmative.

[20] I shall now proceed to discuss the other issues. In view of what I have said above, issue 4 is irrelevant; so also issues 5, 6, 7, 8, 9 and 10.

[21] In the result I pass a decree in favour of the plaintiffs against the defendant in terms of prayers (a), (b), (c) and (d) of the plaint.

[22] As regards prayer (b) of the plaint, whatever amount is found due and payable by the defendant, I direct it to be paid to the plaintiffs as trustees with interest at 6 per cent. till judgment. I pass a decree in terms of prayer (h) with a further direction that the amount is not to be withdrawn by or on behalf of the plaintiffs. The amount should be paid into Court and it should remain in Court or should be invested in such Government securities and in such names as the Advocate-General may direct, and should be handed over to such persons as the Advocate-General may nominate.

[23] As regards prayer (i) of the plaint, I have already held that it is not necessary for me to pass an order for the removal of the defendant from his office as a trustee. The defendant is no longer a trustee and it is not necessary to remove him as a trustee.

[24] I order the defendant to pay to the plaintiffs the costs of the suit and interest on judgment at 4 per cent.

R.G.D.

Suit decreed.

A. I. R. (36) 1949 Bombay 356 [C. N. 92.]

CHAGLA C. J. AND COYAJEE J.

F. Ranchoddas — Plaintiffs — Appellants
v. Nathmal Hirachand & Co. — Defendants — Respondents.

O. C. J. Appeal No. 24 of 1948, Decided on 3rd March 1949.

(a) Contract Act (1872), Ss. 31 and 73 — Contract for sale of good — Goods to be given delivery of when they arrive — Contract held was not a contingent contract but an absolute contract — Failure to deliver goods due to non-arrival of goods amounts to breach.

The defendants entered into a contract for sale by them of American parachute cloth of certain description. The goods were stated to be of January and February shipment. The contract further provided "The goods are to be given delivery of when they arrive". The defendant failed to deliver the goods on account of their non-arrival and therefore the plaintiff sued for damages for breach of contract :

Held that when the parties provided that the goods were to be given delivery of when they arrived they were dealing with the mode of performance and not with the question of the very obligation to perform the contract. The contract was therefore an absolute contract and not a conditional contract. The obligation undertaken by the seller was an absolute obligation and it was not conditioned by or contingent upon the arrival of the goods in India. In this view, there was a clear breach of contract when the defendants failed to deliver the goods and the plaintiff was entitled to damages : A. I. R. (10) 1923 Bom. 54, *Rel. on.*; A. I. R. (7) 1920 Bom. 182, *Disting.* [Paras 2 and 6]

Annotation : ('46-Man.) Contract Act S. 31 N. 1 and S. 73 N. 2.

(b) Contract — Construction — Superfluous term in contract — Court in order to avoid superfluity and to give full effect to every provision of contract cannot construe words in entirely different sense from their natural and grammatical meaning — word 'when' could not be read as 'if'.

There is no canon of construction which would permit a Court in order to avoid superfluity and in order to give full effect to every provision in the contract to construe words in an entirely different sense from their natural and grammatical meaning totally contrary to the meaning which they bear in plain language. [Para 2]

Hence where a contract provides that "the goods are to be delivered when they arrive" the word 'when' in the expression cannot be read as 'if' merely because the expression is a superfluity and incorporates a well-known legal obligation on the vendor. [Para 2]

Annotation : ('46-Man.) Contract Act, S. 10 N. 1.

Sir Jamshedji Kanga — for Appellants.

C. K. Daphtary, Advocate-General and H. V. Shah
— for Respondents.

Chagla C. J. — This appeal raises a very narrow question as to the construction of a contract. The contract was for the sale by the defendants of American five coloured parachute (cloth) having 24 ribsticks pieces 300 at Rs. 61-8-0. The contract states that these goods belonged to H. Bisanesara & Co. and they were of January and February shipment. Then the contract goes on to say that the goods were to be given delivery of when they arrived. The rest of the terms are not material for the purposes of this appeal, and the only question that arises for our determination is whether this was an absolute contract or a contract conditional on the arrival of the goods in India. The plaintiffs filed the suit, from which this appeal arises, for breach of contract in that the defendants failed to give delivery of the goods, and claimed damages. The learned Judge held that the contract was a conditional contract and that as the goods had not arrived in India there was no obligation upon the defendants to give delivery of the goods to the plaintiffs, and he thereupon dismissed the plaintiffs' suit. Now, it is not very wise nor very safe to construe terms of a contract with the assistance of decided cases. Every contract must be construed on its own terms and therefore, before I refer to the cases that were cited at the bar I would like to consider the terms of the contract itself. It is perfectly true that on the face of the contract the goods that the defendants were selling were goods that were to arrive from a foreign country. The goods are mentioned to be American goods and it is also stated that they are to be of January and February shipment. The question is whether the seller undertook an unconditional obligation to deliver these goods or made his obligation contingent upon the goods arriving in India; and in order to decide that we have got to construe just one line in the contract and that is, "The said goods are to be given delivery of

when they arrive." Now, I should like to make it clear that in the official translation, as it appears in the paper book, this provision in the contract has been translated as: "The said goods are to be given delivery of on arrival," and the whole basis of the learned Judge's judgment is the emphasis which he has placed on the expression "on arrival." Now, this contract is in Gujarati, entered into by two Gujarati knowing people, and the Gujarati expression is "*a mal amoye ech Bisnesara and Co. no lidhela te tamone January-February shipmentno vechela che te mal awethi delivery apsu.*"

[2] Now, it is significant to note that the contract does not use the expression "*te mal awe to delivery apsu*". The parties have advisedly used the expression '*awethi*' and there can be no doubt, and we have satisfied ourselves by consulting the Chief Translator, that there is a fundamental difference in Gujarati between '*awethi*' and '*awe to*'. '*Awethi*' means when the goods arrive; and '*awe to*' means if the goods arrive. '*awethi*' has a purely temporal connotation, '*awe to*' imports contingency. There is no element of contingency in the Gujarati expression '*awethi*'. Now, it is perfectly clear that the provision "the said goods are to be given delivery of when they arrive" does not constitute a part of the description of the goods. The goods are clearly and completely described before this provision appears in the contract. The description gives the quality and the prices, and it indicates the shipment, and, therefore, this particular provision only deals with the mode of performance. It states how delivery is to be given. Now, the Advocate General has stressed upon us the point that it is necessary as a well established canon of construction to give due effect to every provision in a contract. We accept that principle, and as far as it is possible we should do so. Now, it is pointed out to us that there is a legal obligation upon the seller to deliver goods when they arrive to the purchaser and there was no necessity whatever why this particular expression should have been incorporated into the contract if all that the parties meant was to give expression to a well-known and well-understood legal obligation. According to the Advocate-General, this would merely be a superfluity and that as far as possible we should lean against holding that any provision in this contract is a superfluity. Therefore, the Advocate-General asks us to construe this provision as meaning that the parties agreed to this contract on the clear understanding that obligations were to attach to the parties to the contract only if the goods arrived in India. Therefore, in effect he asks us to read the expression that the goods "were to be given delivery of 'when' they arrived"

as if they meant that the goods were to be given delivery of 'if' they arrived. Now, I know of no canon of construction which would permit a Court in order to avoid superfluity and in order to give full effect to every provision in the contract to construe words in an entirely different sense from their natural and grammatical meaning, totally contrary to the meaning which they bear in plain language. "When", as far as I know, does not and cannot mean "if" and in the Gujarati language, as I have already pointed out, '*awe to*' is entirely different from '*awethi*'. The very use of the expression '*awethi*' by two Gujarati knowing persons clearly shows what was in their contemplation. It was certainly not in their contemplation that the obligation to deliver was conditional upon the arrival of the goods. If that had been so, nothing would have been easier than for the parties to use the expression '*awe to*'. It very often happens that parties, especially laymen, reproduce in their contracts many legal obligations which, without their stating so, are attached to the contract, and it would not be very surprising if in this case the parties have chosen to reproduce in their contract an obligation to give delivery at a particular time which obligation was already there in law and which need not have been reproduced. I am satisfied on reading the terms of the contract that when the parties provided that the goods were to be given delivery of when they arrived, they were dealing with the mode of performance and not with the question of the very obligation to perform the contract. The obligation to perform the contract was absolute and unconditional; it was only as to how the contract was to be performed that was being dealt with in this particular expression. Now, with very great respect to the learned Judge, who took the contrary view, he has construed the contract as if the contract read, "The said goods are to be taken delivery of on arrival" and he has considered various English authorities which deal with the expression "on arrival". Now, "on" in the English language has two meanings. It may have a purely temporal meaning conveying merely an idea of time, or it may have a meaning by which it would mean the basis or reason of something, and, therefore, if you read "on arrival" as meaning the basis of arrival, namely, that delivery was to be given on the basis of the goods arriving, then certainly you have a condition or contingency in the expression "on". That is not possible in the case of the expression "when". The learned Judge has also referred to the statement of the law in Halsbury and in Benjamin on Sale. There the expression used is "sale of goods to arrive" and "sale of goods on arrival". In that context,

clearly, the expression "to arrive" and "on arrival" would form part of the description of the goods and would not deal with the question of the mode of performance or the mode of giving delivery. I am sure that if the learned Judge's attention had been directed to the correct meaning in the Gujarati language of the expression used by the parties in the contract, he would not have come to the conclusion that he has.

[3] Now, turning to the authorities, we have the decision of the Privy Council in *Hurnandrai v. Pragdas*, 25 Bom. L. R. 537 : (A.I.R. (10) 1923 P. C. 54). There the goods were "bunto" to be manufactured by a certain mill and the contract was that delivery was to be taken as and when the goods were received from the mill. The Bombay High Court held that this was not an absolute but a conditional contract, the obligation being conditional on the goods being received from the mill. The Privy Council rejected that contention and Lord Sumner in delivering the judgment of the Board pointed out that to construe the words "as and when received" to mean "if and when received" would be to convert words which fixed quantities and times for deliveries by instalments into a condition precedent to the obligation to deliver at all and virtually make a new contract. The words certainly regulated the manner of performance, but they did not reduce the fixed quantity sold to a mere maximum, or limit the sale to such goods, not exceeding 864 bales, as the mills might deliver to the defendants during the remainder of the year. Their Lordships sound a note of warning against the Courts trying to construe what is and what is not reasonable for the parties to do. Their Lordships agree that the Courts must put themselves in a frame of mind which would make it possible for them to understand how commercial minds work, but at the same time they say that it is not for the Court to decide what risks a commercial man would take while entering into a contract. It would be open to a party to a contract to contract for the sale of goods absolutely and take the risk of goods not arriving, or a more cautious party may contract for the sale of goods only when they arrived, but what particular risk the merchant is taking can only be determined on the clear words of the contract itself.

[4] The Advocate-General has attempted to distinguish this case by pointing out that the Privy Council did give a definite meaning to the expression "as and when received" which appears in that contract by applying it to the mode of delivery and holding that delivery was to be given by instalments in certain quantities and at certain times. That is perfectly true, but the Privy Council refused to construe "as and when

received" to mean "if and when received." In their opinion to do so would be virtually to make a new contract. Similarly here to read "when" as meaning "if" would be making a new contract for the parties.

[5] Reference was then made to an earlier decision of this Court reported in *Tribhovandas v. Nagindas*, 21 Bom. L. R. 1137 : (A. I. R. (7) 1920 Bom. 182). That was a decision of Heaton and Marten JJ., confirming a decision of Sir Norman Macleod, the Chief Justice. The terms of the contract there were, "the above mentioned goods which are to arrive are sold to you." It will be seen that these terms clearly make "to arrive" a part of the description of the goods themselves. That fact is further emphasised in the other provisions of the contract. The contract further stated, "To be delivered on the safe arrival of the steamer," and on these facts the Court of appeal held that the contract was a conditional contract and not an absolute one. The Advocate-General has also relied on another decision, which is reported on the footnote of this very volume of the Bom. L. R. at p. 1139 : (Suit No. 15 of 1919). That is also a judgment of Sir Norman Macleod. Here again the expression used was, "We have sold the above written goods to arrive." But the Advocate-General particularly relies upon the reasoning of the judgment of Sir Norman Macleod when he emphasized the fact that unless these words were construed to mean as importing a condition, the use of the words would be superfluous because there would be an obligation on the seller to deliver the goods when arrived. I have already indicated earlier that that is an established canon of construction, and with respect, we find no quarrel with this reasoning of the learned Chief Justice, but the learned Chief Justice does not say, and he could not say, that in trying to avoid superfluity the Court should fall into the more serious error of construing words and giving them a meaning entirely different from their natural meaning. Then Sir Norman Macleod, with very great respect to him, falls into the very error which was deprecated by the Privy Council in the case to which I have already referred above. He points out,

"I cannot imagine any person who had indented goods from England or any other part of the world abroad, contracting in any other form, considering the numerous chances there were of the non-arrival of the goods within the stipulated period."

The learned Chief Justice, with respect, was speculating as to what risk commercial men might take in the time of war, a speculation which, as the Privy Council has pointed out, is not permissible to a Court of law. We might also point out that this judgment of the Bombay High Court reported in *Tribhovandas v. Nagindas*,

(21 Bom. L. R. 1137 : A. I. R. (7) 1920 Bom. 182) and the judgment referred to in the footnote there were before the Privy Council when they decided the case of *Hurnandrai v. Pragdas*, 25 Bom. L. R. 537 : (A. I. R. (10) 1923 Bom. 54), because the decision of the High Court which the Privy Council overruled was based upon the decision in *Tribhovandas v. Nagindas*, (21 Bom. L. R. 1137 : A. I. R. (7) 1920 Bom. 182).

[6] In our opinion, therefore, the contract which we are called upon to consider was an absolute contract and not a conditional contract. The obligation undertaken by the seller was an absolute obligation and it was not conditioned by or contingent upon the arrival of the goods in India. In that view of the case, as it is admitted that no delivery was given by the seller to the purchaser on the due date, there is a clear breach of the contract. The parties agreed before the learned Judge that 8th April should be taken as the date of the breach. The result, therefore, will be that the appeal will be allowed, the decree of the learned Judge set aside; there will be a declaration that the defendants have committed a breach of the contract and that the breach was committed on 8th April 1947. There will, therefore, be a reference to the Commissioner to ascertain damages on the basis of the date of the breach being 8th April 1947.

[7] The respondents must pay the costs of the appeal. The costs of the suit and further costs and further directions reserved.

Coyajee J.—I agree.

K.S.

Appeal allowed.

A. I. R. (36) 1949 Bombay 359 [C. N. 93.]

RAJADHYAKSHA AND CHAINANI JJ.

Central Government of India—Defendant—
Applicant v. Chhotalal Chhaganlal Modi —
Plaintiff—Opponent.

Civil Revn. Appln. No. 434 of 1948, Decided on 2nd February 1949, from decision of Asst. Judge, Ahmedabad, in Appeal No. 53 of 1947.

(a) Civil P. C. (1908), S. 115 (c) — Court having jurisdiction to decide question — Court coming to erroneous decision — Court has not acted illegally or with material irregularity.

It is settled law that where a Court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity, because it has come to an erroneous decision on a question of fact or even of law.

Annotation : ('44-Com.) Civil P. C., S. 115 N. 12, Pt. 2. [Para 3]

(b) Civil P. C. (1908), S. 115 (b) — Failure to exercise jurisdiction — Suit filed—Stay application under S. 34, Arbitration Act, rejected — Appeal — Appellate Court considering that there was no

valid reference—Appeal dismissed — Case held fell within cl. (b) — Arbitration Act (1940), S. 34.

Where after a suit was filed an application for stay of suit under S. 34, Arbitration Act, was made to and rejected by the trial Court and an appeal to the District Judge was dismissed as, according to him, the condition requisite for the making of an application for stay was not satisfied because he considered that there was no valid reference to arbitration and it was because of this view of his that he declined to exercise jurisdiction and stay the proceedings which he was otherwise inclined to do :

Held, that the view of the District Judge of the nature of the reference to arbitration resulted in his failure to exercise jurisdiction under S. 34, Arbitration Act and therefore the case fell within cl. (b) of S. 115 : A. I. R. (32) 1945 All. 146, *Ref.* [Para 3]

Annotation : ('44-Com.) Civil P. C., S. 115, N. 11.

(c) Arbitration Act (1940), S. 34 — Telephone hiring contract between plaintiff and Governor-General — Contract providing for reference to arbitration of Director General of Posts and Telegraphs in case of any dispute relating to contract — Dispute arising — Suit by plaintiff — Defendant applying for stay — Agreement held was saved by Excep. 1 to S. 28, Contract Act — Reference to arbitration of Director General held was not bad — Director General held was competent to award damages to plaintiff — Contract Act (1872), S. 28, Excep. 1.

The plaintiff who was a subscriber of a telephone executed a telephone hiring contract in respect of that telephone in favour of the Governor-General. One of the terms of the contract was : "If any dispute shall arise touching the effect of this contract or in any way relating thereto . . . the same shall be referred for decision to the Director General of Posts and Telegraphs and his decision thereon shall be final and binding on the parties." The Posts and Telegraphs Department having determined the contract and disconnected the plaintiff's telephone, the plaintiff brought a suit for a declaration that the determination of contract and the subsequent disconnection of the telephone were illegal and *ultra vires* and for damages for inconvenience, etc. Thereupon the defendant applied for stay of the suit under S. 34 and the application was opposed by the plaintiff on the ground that the Director General of Posts and Telegraphs would not be a proper person to decide the question whether the action of his own department was wrongful :

Held (1) that the agreement in question was not an agreement by which any party thereto was restrained absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings before the ordinary tribunals and, even if it were, Excep. 1 to S. 28, Contract Act, would save such an agreement;

[Para 5]

(2) that there was nothing to show that if the matter was referred for the decision of the Director General of Posts and Telegraphs, he would not bring to bear upon the case an independent judgment and decide fairly and impartially; moreover, the contract was made with the Governor-General, and the reference to the arbitration of the Director General could not be regarded as an agreement for reference to a party to the contract. Therefore, the reference to the arbitration of the Director General was not a bad reference merely by reason of the fact that he happened to be the head of the department which was responsible for hiring the telephone connection to the plaintiff: (1893) 1 Ch. 238; (1894) 2 Ch. 478; (1894) 2 Q. B. 667; 11 Cal. 232 and A. I. R. (19) 1932 Oudh 265, *Rel. on*; A. I. R. (5) 1918 Sind 41, *Disting.* [Paras 7 and 9]

(3) that the demand for damages was a demand relating to the contract and therefore it was within the competence of the Director General to award damages to the plaintiff if he thought fit. [Para 10]

Annotation: ('46-Man.) Arbitration Act, S. 34 N. 6; Contract Act, S. 28, N. 2 and 5.

C. K. Daphtary, Advocate-General and Asst. Government Pleader — for Applicant.

N. C. Shah — for Opponent.

Rajadhyaksha J.—This is an application in revision against an order passed by the Assistant Judge at Ahmedabad confirming the decision of the Civil Judge, Senior Division, Ahmedabad, refusing to stay the proceedings in a suit filed by the plaintiff against the Central Government of India. The plaintiff was a subscriber of telephone No. 5019 and had executed a telephone hiring contract in respect of that telephone. It was signed by him in his personal capacity and not on behalf of any partnership firm. It appears that the telephone was used by other parties who had printed its number on their business letters. The Executive Engineer thereupon served the plaintiff a notice under cl. 15 of the conditions of agreement determining the contract on the expiration of seven days thereof. The telephone was accordingly disconnected on 28th October 1946. On 2nd November 1946, the plaintiff gave a notice of a suit under S. 80, Civil P. C. The Director General of Posts and Telegraphs replied to that notice on 19th December 1946, giving reasons for the disconnection of the telephone. The Assistant Deputy Director General of Posts and Telegraphs informed the plaintiff by a letter dated 4th February 1947, to refer the dispute to arbitration in accordance with condition 19 of the hiring contract. The plaintiff was also informed that Government would apply for stay of the suit, if any suit was filed by the plaintiff. The plaintiff denied having received any such intimation and proceeded to file a suit on 9th February 1947, in the Court of the Civil Judge, Senior Division, Ahmedabad, praying for (1) a declaration that the determination of the contract of hiring of the telephone No. 5019 at Ahmedabad and the subsequent disconnection and removal of the telephone instrument are illegal and *ultra vires*, and (2) a decree for Rs. 900 as damages for inconvenience, mental worry and loss of earnings suffered on account of the disconnection and further damages at Rs. 1000 per month from the date of the suit till restoration of the said telephone. After the suit was filed, an application was made on behalf of the Central Government that the suit might be stayed under S. 34, Arbitration Act, because there existed a clause in the agreement by which any dispute between the parties had to be referred for decision to the Director General of Posts and Telegraphs. The plaintiff opposed the application on two grounds:

(1) that the suit involved complicated questions of fact, and (2) the Director General of Posts and Telegraphs would not be a proper person to decide the question as to whether the action of his own department was wrongful. The learned Judge held that the question involved was not complicated, but was of opinion that the stay could not be granted for two reasons: (1) that there was no provision in the agreement under which the plaintiff would be entitled to claim damages if the dispute was referred for the decision of the Posts and Telegraphs Department, and (2) that a reference to the Director General of Posts and Telegraphs, who was the head of the Posts and Telegraphs Department, was in effect a reference to a person who was one of the contracting parties and thus one of the contracting parties itself would be acting as arbitrator in the case. He therefore thought that it would not be fair to force the plaintiff to go to arbitration. The application was accordingly rejected.

[2] Against that order an appeal was preferred to the District Court of Ahmedabad and was heard by the learned Assistant Judge. The learned Assistant Judge saw no reason why the matter should not be referred to the Director General of Posts and Telegraphs in accordance with the arbitration agreement. But he held that this reference to the Director General of Posts and Telegraphs was not in fact a reference to arbitration. He thought that an official of the department which is responsible for the observance of this contract was certainly in the position of a party to the contract, and that no one could be a judge of his own cause. He seems to have been further of the opinion that a reference to arbitration did not come within the compass of the exception to S. 28, Contract Act, and that therefore the agreement was void under that section. He, therefore, agreed with the view of the trial Court that the proceedings should not be stayed and dismissed the appeal with costs. Against that order this application has been filed in revision.

[3] A preliminary objection has been taken by Mr. N. C. Shah that no revision lies against an order passed by the appellate Court on an application for the stay of proceedings under S. 34, Arbitration Act. He invited our attention to S. 39 of the Act under which there is an appeal from an order refusing to stay legal proceedings where there is an arbitration agreement. He argued that even under S. 115, Civil P. C., this Court had no jurisdiction to entertain an application in revision. Under S. 115, Civil P. C., "the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears (a) to have

exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit."

So far as cl. (c) of the section is concerned, it is settled law that where a Court has jurisdiction to determine a question and it determines that question, it cannot be said that it has acted illegally or with material irregularity, because it has come to an erroneous decision on a question of fact or even of law. Although cl. (c) of S. 115 would not apply to the present case, we are of the opinion that the present case is governed by cl. (b) of S. 115 inasmuch as we think that the learned Assistant Judge has failed to exercise the jurisdiction vested in him. According to the judgment of the learned Assistant Judge, he was prepared to order stay of the proceedings but for the fact that he considered that there was no valid arbitration agreement to which the plaintiff was a party. Under S. 34, Arbitration Act, it is only

"where any party to an arbitration agreement commences any legal proceedings against any other party to the agreement, any party to such legal proceedings may, at any time before filing a written statement or taking any other steps in the proceedings apply to the judicial authority before which the proceedings are pending to stay the proceedings; and if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement and that the applicant was, at the time when the proceedings were commenced and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, such authority may make an order staying the proceedings.

According to the learned Judge, the condition requisite for the making of an application for stay of proceedings was not satisfied because he considered that there was no valid reference to arbitration. It is because of this view of his that he declined to exercise jurisdiction and stay the proceedings which he was otherwise inclined to do. His view therefore of the nature of the reference to arbitration has resulted in his failure to exercise jurisdiction under S. 34, Arbitration Act, and in our opinion the case falls within cl. (b) of S. 115, Civil P. C. In this connection we may refer to a decision of the Allahabad High Court where an application in revision was entertained in respect of applications for the stay of proceedings. In *Charan Das v. Gur Saran Das*, I. L. R. (1945) ALL. 162 : (A. I. R. (32) 1945 ALL. 146), it was held that,

"the objection as to jurisdiction has to be taken by the defendant relying upon the arbitration clause before the filing of the written statement. The Court should look at the plaint and see for itself whether the arbitration clause applies to the dispute, and if it does, whether the nature of the dispute is such that the ends of justice would be better met by the decision of the Court than by that of a private forum.

There is nothing in S. 39 or S. 41, Arbitration Act, to deprive the High Court of the powers conferred on it by S. 115, Civil P. C."

[4] The learned Assistant Judge in the present case has clearly declined to exercise jurisdiction because of his view that there is no valid reference to arbitration. As we are of opinion that the view of the learned Assistant Judge as regards the nature of the reference to arbitration is incorrect, we think that we are entitled to interfere in revision as the learned Judge appears to have failed to exercise the jurisdiction which is vested in him by law.

[5] The main question therefore which arises in this case is whether there has been a valid reference to arbitration. Clause 19, under which the parties were bound to refer the dispute for the decision of the Director General of Posts and Telegraphs, reads as follows :

"If any dispute shall arise touching the effect of this Contract or in any way relating thereto, the decision of which is not expressly provided herein or in the conditions, the same shall be referred for decision to the Director General of Posts and Telegraphs and his decision thereon shall be final and binding on the parties."

Both the lower Courts have taken the view that this is not a proper reference for arbitration because the person to whom the dispute has to be referred for decision is the head of the very department which is in effect, though not in form, a party to the dispute. The agreement itself has been entered into between the plaintiff on the one hand and the Governor-General of India on the other. The agreement was executed on behalf of the Governor-General by the Executive Engineer of the Posts and Telegraphs Department in accordance with the Rules of Business. The question therefore for consideration is whether this reference to arbitration of the Director General of Posts and Telegraphs is vitiated by the fact that he happens to be the head of the department with whom the contract has been entered into by the plaintiff for the hiring of the telephone. The learned Assistant Judge was inclined to consider that this clause does not come within the scope of Exception 1 to S. 28, Contract Act. Under that Exception—

"Section 28 shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred."

It is not quite clear from the judgment of the learned Assistant Judge why this agreement to refer the dispute for the decision of the Director General of Posts and Telegraphs does not come within the scope of Exception 1 to S. 28, Contract Act. Section 28 is intended to make agreements in restraint of legal proceedings void.

There is nothing in cl. 19 of the agreement which precludes one of the parties from going to Court, and S. 34, Arbitration Act, merely says that:

"If one of the parties commences any legal proceedings, the other party may at any time before filing a written statement apply to the judicial authority before which the proceedings are pending to stay the proceedings."

It is open to the party against whom the proceedings are instituted not to insist upon the right which the agreement gives for making a reference to arbitration, and have the matter decided by way of a regular suit. It cannot, therefore, be said that the contract is void because it is in restraint of any legal proceedings.

The agreement in question is not an agreement by which any party thereto is restrained absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings before the ordinary tribunals, and even if it were, in our opinion, Excep. 1 to S. 28 would save such an agreement.

[6] The real question, therefore, for consideration is whether there is a good reference to arbitration in virtue of cl. 19 of the agreement. The only reason why the two lower Courts seem to consider that it is a bad reference is that the person to whom the dispute has been referred is the head of the department dealing with telephone connections. The question, therefore, arises how far this alleged interest of the Director General of Posts and Telegraphs as the head of the department disqualifies him from being an arbitrator in this dispute.

"An arbitrator who has an interest dependent upon his decision is disqualified if either party at the time of his appointment was ignorant of the fact that this would be so, and the interest is of such a nature that it ought to have been disclosed. . . . But if the parties, with full knowledge of the facts, selected an arbitrator who was not an impartial person, or who had to perform other duties which would not permit of his being an impartial person, the Court would not release from them the bargain upon which they had agreed; and if a party to a contract submitted to the jurisdiction of a tribunal which had an interest of its own in the decision the Court would not on that account release him from the bargain, however improvident it was considered to be, so long as the Court was satisfied that he was aware or ought to have been aware of the terms of the bargain he had entered into." (See "Russell on Arbitration and Award", 13th Edn., p. 475. See also Halsbury's Laws of England, Volume I, p. 680).

[7] In *Jackson v. Barry Railway, Co.*, (1893) 1 Ch. 238; (68 L. T. 472), a contract by which the plaintiff undertook to construct a dock for the defendant company provided that any dispute between the company and the contractor as to the meaning of any part of the contract, or as to the quality or description of the materials to be used in the works, should be referred to the company's engineer as arbitrator.

A dispute arose whether the contract required the interior of a certain embankment to be made of stone, or whether rocky marl was allowable, so that, if the contractor by the direction of the engineer used stone, he would be entitled to be paid for it as an extra. Correspondence took place between the contractor and the engineer, in which the engineer stated his view to be that the contract bound the contractor to use stone, and that it was not an extra. The company then referred the dispute to the arbitration of the engineer. After this reference, and on the day for which the first appointment had been made, the engineer wrote to the contractor a letter in which he repeated his former view. The plaintiff brought his action to restrain the company from proceeding further with the arbitration. It was held on appeal:

"that, considering the position of the engineer who, as engineer of the company, must necessarily have already expressed an opinion on the point in dispute, his writing after the commencement of the arbitration a letter repeating the same opinion would not disqualify him from acting as arbitrator unless, on the fair construction of the letter, it appeared that he had made up his mind so as not to be open to change it upon argument."

In delivering the judgment of the Court, Bowen L. J. observed (p. 247):

"Technically, the controversy is one between the plaintiff and the railway company; but, virtually, the engineer, on such an occasion, must be the judge, so to speak, in his own quarrel. Employers find it necessary in their own interest, it seems to impose such terms on the contractors whose tenders they accept, and the contractors are willing, in order that their tenders should be accepted, to be bound by such terms. It is no part of our duty to approach such curiously-coloured contracts, with a desire to upset them or to emancipate the contractor from the burden of a stipulation which, however onerous, it was worth his while to agree to bear. To do so, would be to attempt to dictate to the commercial world the conditions under which it should carry on its business. To an adjudication in such a peculiar reference, the engineer cannot be expected, nor was it intended, that he should come with a mind free from the human weakness of a preconceived opinion. The perfectly open judgment, the absence of all previously formed or pronounced views, which in an ordinary arbitrator are natural and to be looked for, neither party to the contract proposed to exact from the arbitrator of their choice. They knew well that he possibly or probably must be committed to a prior view of his own, and that he might not be impartial in the ordinary sense of the word. What they relied on was his professional honour, his position, his intelligence; and the contractor certainly had a right to demand that whatever view, the engineer might have formed, he would be ready to listen to argument, and, at the last moment, to determine as fairly as he could, after all had been said and heard."

Lord Smith, J. who gave a dissenting judgment, generally agreed with the view as to the nature of the reference to arbitration, but was of the opinion that in the circumstances of that particular case the letter written by the engineer did not, upon a fair construction, show that the engineer

was prepared to keep his mind open. At p. 250 he observed :

"... he (the engineer) was in duty bound as far as possible to do so and to keep an open mind as to the matters upon which he was called upon to adjudicate, and if it be shown that he had failed in this duty, then, ... he is not fit or competent to adjudicate upon the case."

Applying the principles of this case to the case before us, there is nothing on the record to show that if the matter was referred for the decision of the Director General of Posts and Telegraphs, he would not bring to bear upon the case an independent judgment and decide the dispute fairly and impartially. To the same effect are the observations in *Ives and Barker v. Willans*, (1894) 2 Ch. 478 : (63 L. J. Ch. 521) where it was held

"that an arbitration clause referring disputes to the engineer of one party cannot be disregarded on the ground that the engineer is in substance a judge in his own case unless there is sufficient reason to suspect that he will act unfairly."

Lord Lindley J., says (p. 488) :

"They agree to be bound in all disputes between them and the contractor, that is Willans, by the decision of the engineers of the company. They knew the arbitration clauses contained in the original contract, and they knew what the duties of those engineers were, and they knew that amongst other duties was that of passing or rejecting the materials. The sub-contractors agreed to put up the materials which were to be supplied, relying upon the honour and character of the engineers to reject such as were unfit, and they were willing, as the contractor himself was willing, to submit any difference between them and the company, which indirectly is really a difference between them and the engineers to the arbitration of those engineers themselves. That is what is contemplated, and that is the substance of the bargain."

Lord Lopes J., says as follows (p. 492) :

"I will deal shortly with the two main attacks which are made against these engineers and arbitrators. I think the chief one is this. It is said that they are not fit to be trusted, because they have prejudged a certain question with regard to the action, the quality and fitness of certain materials. The answer to that, to my mind, is this : that the parties perfectly well knew, when they consented that these engineers should be arbitrators, that difficulties such as these which are now suggested might arise ; they perfectly well knew that these engineers were the persons who were to determine the quality and character of the materials in question ; they knew that these engineers had to do that as well as to act as arbitrators in what is termed the larger arbitration. Knowing that, they agreed that they would accept the arbitrators, and it appears to me now that they cannot turn round and say that, because their judgment is erroneous, therefore they are not bound to accept it. They agreed to be bound by their judgment, however erroneous it might be, provided it was honest, provided it was not tainted with fraud or with misconduct."

In *Eckersley v. Mersey Docks and Harbour Board*, (1894) 2 Q. B. 667 : (71 L. T. 308) it was held that,

"where, however, in a contract for the execution of works, the arbitrator selected by the parties is the servant of one of them, he is not disqualified by the mere fact that under the terms of the submission he

may have to decide disputes involving the question whether he has himself acted with due skill and competence in advising his employers in respect of the carrying out of the contract."

At p. 670 Lord Esher M. R. observes:

"When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this, that the disputes ought not to be referred to the engineer because he might be suspected of being biassed, although in truth he would not be biassed. It is an attempt to apply the doctrine which is applied to Judges, not merely of the Superior Courts, but to all Judges — that, not only must they be not biassed, but that, even though it be demonstrated that they would not be biassed, they ought not to act as Judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people would suspect them of being biassed. Is that a rule which can be applied to such contracts as this, where, as between the contractor and his principal, both parties agree that the chief servant of one of them shall be the arbitrator? If it was not for the agreement of the parties — if the rule applicable to Judges were to be applied—it is obvious that it would be impossible to say that the engineer, under whose superintendence the work has to be done, could act as arbitrator, because some persons would suspect him of being biassed in favour of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shown, it must in my opinion be shown, if not that he would be biassed, that at least there is a probability that he would be biassed."

To the same effect are the observations of Lopes L. J. at p. 673. In the case of *Aghore Nauth Bannerjee v. Calcutta Tramways Co. Ltd.*, 11 Cal. 232, the following observations occur (p. 235):

"It has been argued for the plaintiff, that the Manager in this case is virtually the Company. But this is not so. The Manager here is no more the Company than the engineer or the architect in the cases to which I have just referred is the employer. Both parties have faith in the Manager and are content to place themselves in his hands, as an arbitrator between them, in the event of dispute."

In *Secretary of State for India in Council v. Saran Brothers & Co.*, 8 Luck. 98; (A. I. R. (19) 1932 Oudh 265) the Deputy Commissioner of a district invited tenders for some work of the Government. The plaintiff's tender was accepted and he entered into a contract with the Secretary of State for India in Council through the Deputy Commissioner. The agreement provided that if owing to breach of any condition of the agreement the work is taken away from the executant, then the Deputy Commissioner would have the power to decide the amount to which he is entitled in respect of the work already done, and that the executant would be bound by the decision of the Deputy Commissioner in all matters relating to the contract. The plaintiff brought a suit against the Secretary of State for India in Council for a certain amount on account of work done under the said contract. It was held that:

"The Deputy Commissioner represented the Secretary of State and acted as his agent. It cannot be said that

the contract was made with the Deputy Commissioner on his own behalf. The agreement must, therefore, be regarded as an agreement executed by the plaintiff in favour of the Secretary of State. Therefore, the agreement for reference to the arbitration of the Deputy Commissioner cannot be regarded as an agreement for reference to a party to the contract. The case, therefore, fell within exception 1 of S. 28, Contract Act, and the agreement to abide by the decision of the Deputy Commissioner must be regarded as an agreement for reference to arbitration and the suit was barred by S. 21, Specific Relief Act."

This case is almost on all fours with the case before us. The contract in this case has been made with the Governor-General, and the reference to the arbitration of the Director General of Posts and Telegraphs cannot be regarded as an agreement for reference to a party to the contract. As we have stated above, such a reference falls within Excep. 1 to S. 28, Contract Act, and is therefore a valid reference.

[8] In view of these authorities, it appears to us to be perfectly clear that the reference to arbitration of the Director General of Posts and Telegraphs in any matters arising out of the contract is a valid reference and one in which the parties have entered with their eyes open. It is not unlikely that the plaintiff entered into this agreement relying upon the sense of duty and the impartiality of the Director General of Posts and Telegraphs and had perfect confidence in him that he would not do anything unjust or unfair in the decision of any dispute between the parties. Such an agreement entered into by the plaintiff with the Governor General, agreeing to refer the dispute to the Director General of Posts and Telegraphs, constitutes, in our opinion, a valid reference.

[9] As against this series of authorities, the only decision to which our attention has been invited is one in *Goverdhandas v. Ramchand*, A. I. R. (5) 1918 Sind 41 : (12 S. L. R. 41). At p. 45 of the Report there are observations of Pratt J. C. that:

"an arbitration tribunal in which the ultimate decision rests with the nominee of the class having such an interest is not an impartial tribunal."

It appears, however, that in the circumstances of that case there were adequate and reasonable grounds for the anticipation that the arbitrator would act with a bias. The case would therefore fall within the dictum of Lord Esher M. R. quoted above, viz., a stronger case than mere suspicion apparent in the very factum of appointment must be made out, i. e., there is a probability that the arbitrator would be biased. Moreover, the authorities to which I have referred above were not considered in the judgment of either of the two learned Judges who decided the case. In the present instance it is not suggested that the Director-General of Posts and

Telegraphs would act with a bias or that there was reasonable probability of his doing so. The learned Assistant Judge himself observes in his judgment that nothing was alleged personally against the Director-General of Posts and Telegraphs, and there is no reason to apprehend that he would not bring to bear upon the decision in dispute a fair and impartial judgment and decide the case with justice and equity. In our opinion therefore the reference to the arbitration of the Director-General of Posts and Telegraphs is not a bad reference merely by reason of the fact that the Director-General happens to be the head of the department which was responsible for hiring the telephone connection to the plaintiff.

[10] It was next urged by Mr. N. C. Shah on behalf of the plaintiff that there was no provision in the arbitration agreement which would enable the Director-General to award damages if he thought fit. In our opinion this argument cannot be accepted. Whether the Assistant Director of Posts and Telegraphs was right or wrong in ordering the disconnection, is a matter which would arise in the dispute and would fall to be determined by the Director-General. It would also be within the competence of the Director-General to give any relief which a decision in favour of the plaintiff would necessitate. Clause 19 refers to "all disputes which are in any way related to the contract." The demand for compensation for wrongful disconnection of the telephone would be considered as a demand relating to the contract. It could hardly have been intended that the Director-General should decide whether the telephone connection was rightly or wrongly disconnected and then leave it to the parties to ask for damages in a civil Court.

[11] It was lastly urged by Mr. Shah that we should not in exercise of our revisional powers interfere with the exercise of discretion of the learned Assistant Judge in refusing the stay. The learned Assistant Judge had in exercise of his discretion come to the conclusion that the stay application should be granted. But it was merely because he thought that there was no valid reference to arbitration that he did not feel himself competent to allow the application. Now that we are of the opinion that there is a valid reference to arbitration, we accept the view taken by the Assistant Judge that this is a case in which the stay application should be granted. We are, therefore, not interfering with the exercise of his discretion on the merits of the case.

[12] We, therefore, set aside the order of the learned Assistant Judge and direct that the suit be stayed pending the decision of the Director-General of Posts and Telegraphs on an application made to him under cl. 19 of the agreement.

[13] We accordingly make the rule absolute and direct that the opponent should pay the costs of the applicant both in this Court and in the lower Courts.

V.R.B.

Rule made absolute.

A. I. R. (36) 1949 Bombay 365 [C. N. 94.]

BHAGWATI J.

Abdul Gani—Petitioner v. Commissioner of Police, Bombay — Respondents.

O. C. J. Misc. Appln. No. 160 of 1947, Decided on 28th September 1948.

Bombay Public Security Measures Act (VI [6] of 1947) S. 6 (1)—'Inhabitant'—Meaning of — Collective fine imposed on owner of pan-shop, a resident of another locality—Order is valid.

The word 'inhabitant' as used in S. 6 of the Bombay Public Security Measures Act, 1947, is not used in the sense of residents of the particular locality or permanent residents thereof, but in the sense of the persons who are besides being permanent residents, also the occupants in the sense of carrying on business. Hence an order imposing a collective fine on an owner of a pan-shop who is a resident of another locality would be justified under S. 6. (1837) 6 A. & E. 153; *Rel. on.* [Para 2]

G. A. Thakkar—for Petitioner.

M. P. Amin, Ag. Advocate-General—for Respondents.

FACTS.—On 29th June 1947, a stabbing incident took place in the locality in which the petitioner Abdul Gani carried on a hotel. The Commissioner of Police, Bombay, imposed a collective fine of Rs. 300 under S. 6, Bombay Public Security Measures Act, 1947, on the Muslim inhabitants of house No. 141 viz., the hotel keeper, Abdul Gani and a pan-shop proprietor, Mahomed Aiya. Abdul Gani resided on the upper floor of the same house but Mahomed Aiya resided in a different locality. Abdul Gani filed the present application for a writ of certiorari or in the alternative for an order under S. 45, Specific Relief Act, on the Commissioner of Police, Bombay, for refund of the fine so collected.

Order.—[His Lordship, after stating the facts of the case, proceeded:] It was further urged that it is only the inhabitants of the area who are to be subjected to a collective fine under S. 6 (1) of the Act. The petitioner was no doubt living on the upper floor of the building in which the hotel and the pan-shop were situate but so far as Mahomed Aiya the alleged owner of the pan-shop was concerned, he was not staying in that building but in a room which was obtained on a lease in a building at Bapty Road or 1st Kamathipura Lane, whatever the locality may be, and therefore he certainly was not an inhabitant of that area, and the collective fine which was imposed on the petitioner an inhabitant of the area and Mahomed Aiya who was not an inhabitant of the area could not be justified under the terms of S. 6 (1) of the Act. It was contended that in order to be an inhabitant of the area one has to be a permanent resident in

that area. The learned Advocate General, however, pointed out that the word "inhabitant" as used in this context did not mean a permanent resident in that locality but meant an occupant or a person who was carrying on business in that particular locality having regard to the provisions of the collective fine enacted in the Act. He drew my attention to a case in *Leigh v. Chapman*, 2 Saunders' Rep., Part 2, p. 422 (f). In which an occupier of land within a hundred, (*sic.*) was held to be an inhabitant within the Statutes of Hue and Cry, although he had neither a house nor lodges there. I find in the foot-note at p. 423 (e) of this report a passage which is very instructive on this point. After referring to several cases which illustrated the meaning of the word "inhabitant", the note proceeds to say that the word cannot be said to have any fixed meaning, but must be taken according to the subject-matter. The authority for this proposition is *The King v. Mashiter*, (1837) 6 A. & E. 153 : (45 R. R. 433), and the judgment of Littledale J. which is reported there. It runs as follows (p. 165):

"It is difficult to assign a meaning to the word 'inhabitants'. Under the Statute of Bridges it means persons holding lands in the county. In the grant of a way over a field to church it would extend to all persons in the parish. It must be taken according to the subject-matter, and be explained, as circumstances allow, sometimes by usage, sometimes by the context or object of a charter. It cannot be said to have any fixed meaning. It ought, therefore, to have been shewn, on this application, who, beyond tenants, were meant by the words 'tenants and inhabitants.' It might be lodgers, inmates, servants, or, perhaps, other descriptions or persons. Those who rely upon the term ought to have shewn what was the character of those whom they seek to introduce under it."

[2] Having regard to these observations, I am of opinion that the word "inhabitant" as used in this context of the Act, (Bombay Public Security Measures Act, 1947) is not used in the sense of residents of that locality or permanent residents thereof, but in the sense of the persons who are besides being permanent residents also the occupants in the sense of carrying on business of the nature which I have before me. If that is the true construction, the result will be that if Mahomed Aiya be proved to be the owner of the pan-shop, he would be an inhabitant within this area along with the petitioner who admittedly had a dwelling house on the upper floor of the building in which the hotel as well as the pan-shop were situate.

[3] [After discussing the facts of the case, the judgment concluded:] I have come to the conclusion that the petitioner has failed to establish what was incumbent upon him to do in order to succeed in view of the collective fine receipt which he produced that he was at all material times the owner of the hotel as well as the pan-shop.

[4] The result, therefore, will be that the collective fine order would be valid and legal and passed in accordance with the provisions of S. 6 (1) of the Act and the petitioner is not entitled to any relief in respect of the same as prayed for by him. The petition will, therefore, be dismissed.

[5] As regards costs, the petitioner came to the Court on two counts, (1) the collective fine order and (2) the suspension of the licence order. As I have stated before in my judgment, counsel for the petitioner very wisely did not press that that order was wrong and did not take up unnecessary time of the Court in order to justify the stand which he had taken in the petition. So far as that order is concerned, therefore, without anything more I would say that there should be no order as to costs of and occasioned by reason of putting that order of suspension of the licence in issue between the parties. The petitioner would no doubt be liable to pay the costs of the petition in so far as he canvassed the legality of the order as to collective fine which was imposed on him by respondent 1. The fairest order, therefore, in my opinion, would be that the petitioner should pay to the respondent one-half of the costs of this petition.

K.S.

Petition dismissed.

A. I. R. (36) 1949 Bombay 366 [C. N. 95.]

CHAGLA C. J.

Kondiba Vithoba Shinde — Applicant v. Dagdu Rama Khendke — Opponent.

Civil Revn. Appln. No. 590 of 1948, Decided on 30th March 1949, from order of Dist. Judge, Ahmednagar, in Revn. Appln. No. 53 of 1945.

Dekhan Agriculturists' Relief Act (XVII [17] of 1879), S. 53 — Revisional jurisdiction of District Judge — He can interfere with findings of fact, if he is satisfied that failure of justice has resulted — In such case High Court will not revise order of District Judge — Civil P. C. (1908), S. 115.

Section 53 confers upon the District Judge revisional powers of the nature stated in that section. It is competent for him to set aside an order made by the trial Court if he is satisfied that that order is erroneous either because it is illegal or it is improper. The jurisdiction is not confined to questions of law only. It empowers him to interfere with findings of fact, provided he is satisfied that a failure of justice has resulted.

But it is not necessary that the District Judge must in terms so state in his judgment before it could be said that he has exercised a proper jurisdiction.

If a District Judge takes the view that a decision on facts is clearly wrong and that the transaction is a mortgage and not a sale, being emphatically and clearly of the opinion that the consideration paid for the ostensible sale of the property was grossly inadequate, it cannot be contended that there was no failure of justice, entitling the District Judge under S. 53 to interfere with such a decision.

In such a case the High Court will not interfere under S. 115, Civil P. C., with the orders of the District Judge under S. 53 : 18 Bom. 347 and 19 Bom. 286,

Ref.; A. I. R. (25) 1938 Bom. 159, *Disting.*; Civil Revn. Appln. No. 743 of 1948 (Bom.), *Not approved.*

[Paras 2 and 3]

Annotation : ('44-Com.) Civil P. C., S. 115 N. 2.

J. G. Rele — for Applicant.

S. A. Kher — for Opponent.

Order. — This is an application in revision against an order made by the District Judge, Ahmednagar, holding that the decision of the Extra Joint Sub-Judge, Ahmednagar, that a transaction dated 3rd May 1919, was a sale and not a mortgage as contended by the plaintiff, was not correct. In passing this order the learned District Judge was exercising jurisdiction vested in him under S. 53, Dekhan Agriculturists' Relief Act and that section confers upon him revisional powers of the nature stated in that section. It is competent to him to set aside an order made by the trial Court if he is satisfied that that order is erroneous either because it is illegal or it is improper and the proviso to that section really indicates what is the foundation of the jurisdiction conferred under that section, and that foundation is that no decree or order shall be reversed or altered for any error or defect or otherwise unless a failure of justice appears to have taken place.

[2] Now, Mr. Rele contends that it was not competent to the District Judge under S. 53 to differ from the trial Court on a question of fact. The learned District Judge considered the various tests that were applied by the trial Court in coming to the conclusion whether the transaction was a sale or a mortgage, and he attached the greatest importance to the fact that the price paid for the ostensible sale of this property was Rs. 99, and according to him, having considered various factors, that was a wholly and grossly inadequate consideration. Mr. Rele says that the trial Court having come to the contrary conclusion on this point, it was not open to the District Judge to reverse the finding of the trial Court which was essentially a finding of fact, and for this purpose Mr. Rele strongly relies on a decision of Dixit J. recently delivered in *Chagniram Ramchand v. Hari Shivram*, Civil Revn. Appln. 743 of 1948, D/- 4th March 1949. In that case the learned Judge took the view that unless there was an indication in the judgment itself that there was a failure of justice, it was not open to the learned District Judge to interfere with the finding of fact arrived at by the trial Judge, and in coming to that conclusion Dixit J. relied on a decision of Sir John Beaumont C. J., in *Babaji v. Bala*, 40 Bom. L. R. 104 : (A. I. R. (25) 1938 Bom. 159). That decision was on the terms of S. 23 (2), Mamlatdars' Courts Act, and Sir John Beaumont took the view that under that section the jurisdiction of the Collector did not extend to

reversing the order of the Mamlatdar on a question of fact. That decision, with respect, has no bearing on the question as to what is the limit of the jurisdiction of the District Judge under s. 53. We have, however, three direct decisions of our own Court which have construed s. 53, Dekkhan Agriculturists' Relief Act. The first decision is *Shidu v. Bali*, 15 Bom. 180. In that case, Birdwood and Telang JJ. held that the revisional jurisdiction of the Special Judge under ss. 53 and 54 was similar to the revisional jurisdiction possessed by the High Court under the Code of Criminal Procedure and the power of setting aside a decision of a lower Court on facts should be exercised in very exceptional cases. The next decision is *Rayachand Mayachand v. Sultan Rahimbhai*, 18 Bom. 347. There Sir Charles Sargent C. J., and Telang J. came to the conclusion that where the Special Judge under the Dekkhan Agriculturists' Relief Act entertains a clear opinion that the findings of the Subordinate Judge on the questions of fact are erroneous, and exercises his discretion in setting aside the decree, the High Court will not in its extraordinary jurisdiction interfere with the discretion, except under most exceptional circumstances. And finally there is a decision in *Gurubasaya v. Chanmalappa*, 19 Bom. 236. That is a decision of Sir Charles Sargent C. J., and Fulton J., and this Bench held that under s. 53 the Special Judge had a revisionary power in all cases where a failure of justice appears to have taken place. It is for him to decide whether the finding on a question of fact by a Subordinate Judge is of that nature, and in doing so he is entirely within his jurisdiction. This Bench expressly dissented from the view taken in the earlier decision of *Shidu v. Bali*: (15 Bom. 180) that the jurisdiction of the District Judge or Special Judge under s. 53 was comparable to the revisional jurisdiction of the High Court under the Criminal Procedure Code, and the Chief Justice in his judgment says that although Telang J. was a party to the decision in *Shidu v. Bali*: (15 Bom. 180), he on reconsideration took the view which was now expressed by the Chief Justice, in his judgment. Therefore, it is clear from these decisions that it is undoubted and undisputed law that under s. 53 the District Judge has jurisdiction to interfere with the finding of fact of the trial Court. It cannot be said that the revisionary powers of the District Judge are confined so that he can only interfere with the order of the trial Court only on questions of law. It is true that when a District Judge interferes with the finding of the trial Court on a question of fact, he should only do so when he is satisfied that a failure of justice has resulted. But I do not agree, with

respect, with Dixit J., that the District Judge must in terms so state in his judgment before it could be said that he has exercised a proper jurisdiction. If a District Judge takes the view that a decision on facts is clearly wrong and that the transaction is a mortgage and not a sale, it is difficult to understand how it is possible to contend that there is not a failure of justice, in that a wrong decision has been given against the plaintiff.

[3] In this case the District Judge is emphatically and clearly of the opinion that the consideration paid for the ostensible sale of the property was grossly inadequate. Having come to that conclusion, the only thing open to him was to reverse the decision of the trial Court. If he had not done so, he would have allowed the failure of justice to remain unrectified. It is true that the learned District Judge does not in terms say in his judgment that there is a failure of justice, but it is not very difficult to infer from his judgment that if he had not set aside the order of the trial Court he would have allowed the defendant to succeed, when on the merits of the case the plaintiff was entitled to the declaration that he sought. In my opinion, therefore, this is not a case where I would interfere under the extraordinary powers given to us under s. 115, Civil P. C.

[4] The result is that the application fails and is dismissed with costs.

R.G.D.

Revision dismissed.

A. I. R. (36) 1949 Bombay 367 [C. N. 96.]

BHAGWATI AND DIXIT JJ.

Digambarao Hanmantrao Deshpande—Plaintiff—Appellant v. Rangrao Raghunathrao Desai and another—Defendants—Respondents.

First Appeal No. 112 of 1946, Decided on 25th March 1949, from decision of Civil Judge (Senior Division), Hubli, in Civil Suit No. 79 of 1944.

Civil P. C. (1908), S. 11 — Res judicata prevails over *lis pendens*—Matter res judicata—*Lis pendens* also applying to case—Decision is res judicata and binds also transferees pendente lite — T. P. Act (1882), S. 52.

The rule of *res judicata* prevails over the doctrine of *lis pendens* and once a judgment is duly pronounced by a competent Court in regard to the subject-matter of the suit in which the doctrine of *lis pendens* applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees pendente lite from them.

[Para 14]

Nature of the rule of *res judicata* and the doctrine of *lis pendens* discussed: (1857) 1 De. G. & J. 566 and 29 All. 339 (P. C.), Ref.

[Paras 11, 12]

Annotation: ('44-Com.) Civil P. C., S. 11, N. 2 and 4; ('45-Com.) T. P. Act, S. 52, N. 4.

S. R. Parulekar — for Appellant.

K. G. Datar and G. R. Madbhavi — for Respondents 1 and 2, respectively.

Bhagwati J.—This is a first appeal from a decision of the Civil Judge, Senior Division, at Hubli, who dismissed the plaintiff's suit.

[2] The suit came to be filed by the plaintiff under the following circumstances. The plaintiff's father initiated a suit, being Suit No. 438 of 1911, in the First Class Subordinate Judge's Court at Dharwar, by filing a pauper petition No. 5 of 1910 against his brother Laxmipati and others including one Hanmant Krishna Deshpande who was defendant 21 in the suit. The suit was a suit for partition claiming a half share in the ancestral properties, the properties included in the suit being Survey Nos. 49, 52, 116, 17 and 20. This suit had a chequered career as appears from the judgment delivered by this Court in *Digambar Hanmant v. Shrinivas Laxmipatirao*, F. A. No. 84 of 1934, D/- 15th December 1937 by Broomfield and Sen JJ. The plaintiff's father having died in the meanwhile the plaintiff filed and prosecuted the appeal, and it appears that on 15th December 1937, a decree was passed by the Appeal Court in terms of the compromise which had been arrived at between the plaintiff and defendant 21, Hanmant Krishna Deshpande, who was respondent 18 in the appeal, under which the plaintiff was declared to be the full owner of Survey Nos. 49, 52, 116, 17 and 20.

[3] There had been in the meantime another series of litigation to which the plaintiff's father and his brother Laxmipati were parties. A suit being suit No. 551 of 1910 had been filed in the Second Class Subordinate Judge's Court at Hubli by one Padmawa, the daughter of one Hanmant, against the plaintiff's father, his brother Laxmipati and the heirs of Bistawa and Balawa who were the two sisters of Padmawa. Padmawa had a one-third share in the properties the subject-matter of the suit, having inherited them as the heir of her deceased father Hanmant after the death of her mother Gangabai. She had also purchased the one-third share of her sister Balawa, with the result that in that suit she claimed a two-thirds share in the suit properties. These suit properties were again the very same Survey Nos. 49, 52, 116, 17 and 20 and were claimed by Padmawa as belonging to the estate of her deceased father. The plaintiff's father and his brother Laxmipati claimed to be the owners of these properties by adverse possession. Hanmant Krishna Deshpande, defendant 21 in, Suit No. 438 of 1911 in the First Class Subordinate Judge's Court at Dharwar, was defendant 7 in this suit, he having purchased the one-third share of Bistawa the other sister of Padmawa. It appears that Hanmant Krishna Deshpande relinquished his one-third share in the properties of Hanmant the father of Padmawa, Bistawa and Balawa in favour of one Bhimaji

Shivaji and Bhimaji Shivaji also purchased Padmawa's interest in these properties which had comprised not only her one-third share therein but the one-third share of Balawa which she in her turn had purchased. The result was that Bhimaji Shivaji became the absolute owner of the whole of the interest in the suit properties and he prosecuted the suit in his capacity as such owner against the plaintiff's father and his brother Laxmipati who were claiming these properties by adverse possession. In that suit Bhimaji Shivaji obtained a decree on 4th August 1915, declaring him to be the absolute owner of these properties as against the plaintiff's father and his brother Laxmipati. In execution of this decree Bhimaji Shivaji obtained possession of the suit properties and in 1917 made a gift of the same to Laxmipati's wife by name Tungabai. After Bhimaji Shivaji's death Hanmant defendant No. 1 who was his undivided nephew filed a suit being suit No. 78 of 1928 for possession of the suit properties against Tungabai and obtained possession of the same on 17th March 1934. Defendant 1 continued in possession of the suit properties from 17th March 1934, until 11th June 1941, when he was dispossessed of the same under the circumstances hereinafter stated.

[4] As already stated before, under the terms of the compromise decree obtained on 15th December 1937, in *Digambar Hanmant's case* (F. A. No. 84 of 1934, D/- 15th December 1937), in appeal from the decree passed by the First Class Subordinate Judge's Court at Dharwar in Suit No. 438 of 1911, the plaintiff had been declared the owner of the suit properties as against defendant 21 Hanmant Krishna Deshpande, respondent 18 in the appeal. In execution of that decree which he obtained on 15th December 1937, the plaintiff filed a darkhast being Darkhast No. 131 of 1939 against the present defendants and in execution of that darkhast got possession of the suit properties on 11th June 1941. A civil revision application was filed by defendant 1 being Miscellaneous No. 36 of 1941 on 21st July 1941, for restoration of possession of the properties. That was, however, filed beyond the period of 30 days, with the result that it was liable to be dismissed. Defendant 1 therefore on 14th April 1942, filed a purshis to the effect that even though he was not himself a party to the decree in execution of which possession was taken, he was the legal representative of the parties to the decree. He stated that Hanmant Krishna Deshpande who was a party to the decree had sold the lands to Bhimaji Shivaji after the institution of the suit, that he claimed through Bhimaji Shivaji, that he had actually taken possession of the lands from Tungabai Laxmipati who was also a party to the suit in which the decree

under execution was passed, and that he being a transferee pending litigation was under the law as interpreted in Bombay a party to the decree. An order was made on this application on 16th April 1942, by the learned Joint First Class Subordinate Judge holding that there was no legal objection why he should not treat the application as one under S. 47, Civil P. C., and further holding that the application was within time as it had been filed within three years from the date of dispossession. The application was then dealt with on the merits and an order was passed by him on 16th April 1942, to the effect that the decree of which execution was sought did not provide that the decree-holder should obtain possession of the suit properties from the judgment-debtor, that it was a mere declaratory decree and that, therefore, the plaintiff was not entitled to possession of the suit properties in execution of the decree. A civil revision application, being Misc. No. 876 of 1942, was filed for the purpose of amending the decree which had been obtained by the plaintiff on 15th December 1937, and a First Appeal No. 208 of 1942 was also filed by him against the order dated 16th April 1942. This Civil Revision Application No. 867 of 1942 was dismissed on 24th July 1944, and in the result the plaintiff also withdrew the First Appeal No. 208 of 1942 which he had filed. The plaintiff ultimately filed the present suit on 25th September 1944, for an order and injunction against the defendants restraining defendant 1 permanently from taking possession of the suit properties from the plaintiff and further and other reliefs.

[5] A written statement was filed by defendant 1 in which he contended that the decision in suit No. 551 of 1910 barred the plaintiff's present suit as *res judicata* and that the plaintiff was not entitled to any relief as prayed.

[6] On these pleadings the suit came on for hearing before the learned Civil Judge, Senior Division, at Hubli. Various issues were raised amongst which were the following issues :

(6) Whether the present suit is barred as *res judicata* having regard to the decision in suit No. 551 of 1910 ?

(8) Whether the defendants have perfected their title by adverse possession ?

(12) Whether the decree in suit No. 551 of 1910 bars the present suit as *res judicata* ? and

(16) Whether the decision in suit No. 438 of 1911 bars the present suit as *res judicata* ?

Even though it had been contended by defendant 1 in his written statement that the compromise entered into between the plaintiff and Hanmant Krishna Deshpande was tainted by fraud and could not be binding on defendant 1 no issue was raised in respect of the same. After hearing the evidence adduced before him the

learned Judge came to the conclusion that the decision in suit No. 438 of 1911 did not bar the present suit as *res judicata* but the decree in suit No. 551 of 1910 barred the present suit as *res judicata*. On issue No. 8, viz., whether the defendants had perfected their title by adverse possession, he did not consider it necessary to go into the same and the answer to that issue was "unnecessary." The learned Civil Judge having come to the conclusion that the decree in suit No. 551 of 1910 barred the present suit as *res judicata* eventually dismissed the plaintiff's suit. This appeal was filed by the plaintiff against that decision of the learned Civil Judge.

[7] Mr. Parulekar appearing for the appellant has very strenuously contended before us that defendant 1 having taken up a particular stand in the pursuis which he had filed in Misc. No. 36 of 1941 on 14th April 1942, and having obtained a decision of the Court in his favour on the strength of the statements therein contained could not now be heard to urge anything to the contrary. He could not be allowed to approbate and reprobate and now contend that he was not the transferee *pendente lite* from Hanmant Krishna Deshpande. He urged that if defendant 1 was the transferee *pendente lite* from Hanmant Krishna Deshpande, he, defendant 1, was bound by the compromise decree which was passed in *Digambar Hanmant's case* (F. A. No. 84 of 1934) on 15th December 1937, and if that was so, there was no question of his being entitled to possession of any of the suit properties, but on the contrary the plaintiff who had been declared the owner of the suit properties under the terms of the compromise decree was entitled to possession of the suit properties and was entitled to the reliefs which he had prayed for in the present suit.

[8] The answer to this contention of Mr. Parulekar which was given by Mr. K. G. Datar appearing for defendant 1 was that where there was a conflict between *res judicata* and *lis pendens*, *lis pendens* gave way and the principle of *res judicata* reigned supreme. He urged that in suit No. 551 of 1910 above referred to the plaintiff's father and his brother Laxmipati as also Hanmant Krishna Deshpande and his transferee *pendente lite* Bhimaji Shivaji through whom defendant 1 claimed were all parties and they were also parties to suit No. 438 of 1911. There was thus litigation in respect of the very same properties between the same parties or their representatives-in-interest and the decision in suit No. 551 of 1910 was reached on 4th August 1915, long before any decision in respect of the same properties was reached in suit No. 438 of 1911. The position in law, therefore, was that under

Expln. 1 to S. 11, Civil P.C., suit No. 551 of 1910 having been decided prior to suit No. 438 of 1911, the decision in suit No. 551 of 1910 became *res judicata*. He further urged that the decision in suit No. 551 of 1910 having thus become *res judicata*, the terms of the compromise decree arrived at in *Digambar Hanmant's case* (F.A. No. 84 of 1934 D/- 15th December 1937) had not the effect of abrogating or in any manner whatsoever modifying the terms of the decree in suit No. 551 of 1910 even though there may have been a transfer *pendente lite* of the right, title and interest of Hanmant Krishna Deshpande in the suit properties as they were the subject-matter of suit No. 438 of 1911.

[9] On the record as it stands before us we have not been able to appreciate definitely whether all the properties being survey Nos. 49, 52, 116, 17 and 20 were the subject-matter of both the series of litigation. We shall, however, proceed upon that basis as all the arguments addressed by the learned advocates before us were addressed to us on that assumption. It may be noted, however, that in so far as suit No. 438 of 1911 was concerned it was for obtaining a one-half share in these properties which were described as the ancestral properties as between the plaintiff's father on the one hand and his brother Laxmipati and Hanmant Krishna Deshpande on the other. How Hanmant Krishna Deshpande came to claim these properties or a share therein and what, if any, was his interest in the suit properties, we have not been able to exactly understand. The terms of the compromise decree dated 15th December 1937, however, declared the plaintiff as the absolute owner of these suit properties and we can only take it that by some manipulation or other it came about that the plaintiff was declared the sole owner of these properties. The claim of the plaintiff's father and his brother Laxmipati on the other hand in suit No. 551 of 1910 was that they had acquired all the suit properties by adverse possession. Whether it was a claim by their joint family against outsiders claiming to be the owners of these properties by adverse possession or it was a claim by them in their individual capacities, it is also difficult to understand. The fact, however, remains that the very same properties appear to have been claimed by both of them by adverse possession. Whatever may be the exact nature of the claim of Hanmant Krishna Deshpande in these properties, the fact also remains that he was a party to suit No. 438 of 1911 and he was also a party, being the purchaser of the one-third share of Bistawa in the suit properties in suit No. 551 of 1910. As a matter of fact by reason of the various transfers and assignments of the respective shares of

Padmawa, Bistawa and Balawa in the suit properties, Bhimaji Shivaji came to be the absolute owner of the suit properties and claimed the same as such against the plaintiff's father and his brother Laxmipati, with the result that in suit No. 551 of 1910 also the contest was between the plaintiff's father and his brother Laxmipati on the one hand and Bhimaji Shivaji who was *inter alia* the representative-in-interest of Hanmant Krishna Deshpande on the other. After the contest the decree was obtained by Bhimaji Shivaji on 4th August 1915, in suit No. 551 of 1910 and possession was also obtained by him of the suit properties in execution of that decree before he made a gift of the same to Laxmipati's wife Tungabai. Defendant 1 obtained possession of the suit properties from Tungabai claiming to be the undivided nephew of Bhimaji Shivaji and thus claiming to be his representative-in-interest. Defendant 1 thus was the representative-in-interest of Hanmant Krishna Deshpande who was a party to the suit No. 551 of 1910 and that is the position which he took up in the purchase which he filed on 14th April 1942. If he was the representative-in-interest of Hanmant Krishna Deshpande so far as suit No. 551 of 1910 was concerned, he also became a representative-in-interest of Hanmant Krishna Deshpande in suit No. 438 of 1911, because whatever right, title and interest Hanmant Krishna Deshpande claimed in the properties the subject-matter of suit No. 438 of 1911 was the subject-matter of the transfer *pendente lite*, in favour of Bhimaji Shivaji by Hanmant Krishna Deshpande and defendant 1 claimed through Bhimaji Shivaji. The position, therefore, was that even though, so far as suit No. 438 of 1911 was concerned, defendant 1 occupied the position of a third party who had during the pendency of that suit obtained a transfer of the right, title and interest of Hanmant Krishna Deshpande in the suit properties, so far as suit No. 551 of 1910 was concerned he was not a transferee but a party to the suit through his predecessor-in-interest Bhimaji Shivaji. There was an adjudication of the respective rights of the parties in suit No. 551 of 1910 and that decision was reached by the Court after fully hearing the parties and was capable of barring any other suit in respect of the same properties as *res judicata*. Once that decision was reached, there was a bar by reason of the provisions of S. 11, Civil P. C., to any Court deciding the same issue over again and it was not competent after 4th August 1915, to the First Class Subordinate Judge's Court at Dharwar to try suit No. 438 of 1911 and decide the same questions over again as to whether the plaintiff's father his brother Laxmipati and/or Hanmant Krishna Deshpande had any interest

in the properties the subject-matter of that suit. No doubt the transfer by Hanmant Krishna Deshpande of his right, title and interest was made to Bhimaji Shivaji during the pendency of the suit and therefore the operation of the doctrine of *lis pendens* was invited. But once the issue as to the right, title and interest of the respective parties in the suit properties became *res judicata* by reason of the decision reached in suit No. 551 of 1910 on 4th August 1915, there was nothing more to be done by any Court so far as the parties themselves and their representatives-in-interest were concerned. There was no *lis* left and the cause of action in the *lis pendens* which was there was effectively merged in the decision which had been reached in suit No. 551 of 1910.

[10] Mr. K. G. Datar in this behalf drew our attention to a decision of the Calcutta High Court reported in *Official Assignee of Calcutta v. Jagabandhu Mullik*, 61 Cal. 494: (A.I.R. (21) 1934 Cal. 552). There the conflict was between *lis pendens* on the one hand and constructive *res judicata* on the other. The Courts below had found that the rule of constructive *res judicata* applied and they also referred in their respective judgments to the question of the applicability of the doctrine of *lis pendens*. The trial Court refused to allow the question of *lis pendens* to be raised on the ground that no such case had been set up in the plaint, and accordingly dismissed the suit; but the lower appellate Court allowed the question to be raised as all necessary facts had been stated in the plaint; and holding that the doctrine of *lis pendens* should prevail over the rule of constructive *res judicata*, allowed the appeal and decreed the plaintiff's suit. It appears to have been conceded before the High Court that the view of the lower appellate Court that the doctrine of *lis pendens* should prevail over the rule of constructive *res judicata* could not be supported and the decision of the learned Judges was based only on the question whether the rule of constructive *res judicata* applied to the case or not.

[11] Even though this conflict between the doctrine of *lis pendens* and the rule of *res judicata* appears to have been resolved in that case before the learned Judges of the Calcutta High Court by a concession made by counsel, we think that the concession was rightly made. *Res judicata* means a matter adjudicated upon or a matter on which judgment has been pronounced. The rule of *res judicata* has been put on two grounds, the one the hardship to the individual that he should be vexed twice for the same cause, and the other, public policy, that it is in the interest of the State that there should be an end of litigation: See *Lockyer v. Ferryman*, 1877-2 A. C.

519. The rule is based on this principle that the cause of action which would sustain the second suit does not any more survive, it being merged in the judgment of the first. It is well established that every suit has got to be sustained by a cause of action, and if by the decision reached in the first suit, meaning thereby a previously decided suit, the cause of action no more survives, being merged in the judgment, where could be the cause of action left which would sustain the second suit after the decision was reached in the first suit? Up to the time the decision was reached in the first suit it would be possible to say that there is a cause of action which could sustain both the suits. The suits are pending and the cause of action can be litigated between the contesting parties. Once, however, the cause of action ceases to exist being merged in a judgment duly pronounced by a Court, the decision reached in that suit becomes *res judicata*. The cause of action which till then sustained the second suit does not survive any more and no Court after such decision has been reached by a competent Court in the previously decided suit would under the provisions of S. 11, Civil P. C. or otherwise on general principles would try any suit in which the same cause of action is contested between the same parties or parties under whom they or any of them claim litigating under the same title. The matter would be concluded between the parties, provided of course, the matter in issue was directly and substantially in issue in the previously decided suit. If it was only collaterally in issue, it would not be *res judicata*. Subject to this and other conditions which have been laid down in S. 11, Civil P. C., a decision reached in the previously decided suit would be *res judicata* and there will be no question whatever of the same matter being litigated over again in the second suit which, as has been observed above, would not be capable of being sustained any further by reason of the cause of action having merged in the judgment pronounced in the previously decided suit. This is the rule of *res judicata*.

[12] *Lis pendens* is an action pending and the doctrine of *lis pendens* is that an alienee *pendente lite* is bound by the result of the litigation. As Turner L. J. said in the leading case of *Bellamy v. Sabine*, (1857) 1 De. G. & J. 566 : (26 L. J. Ch. 797) (pp. 578, 584) :

"It is, as I think, a doctrine common to the Courts both of Law and Equity, and rests, as I apprehend, upon this foundation,—that it would plainly be impossible that any action or suit could be brought to a successful termination, if alienations *pendente lite* were permitted to prevail. The plaintiff would be liable in every case to be defeated by the defendant's alienating before the judgment or decree, and would be driven to commence his proceedings, *de novo* subject again to be defeated by the same course of proceeding."

The Privy Council also has adopted the same principle in *Faiyaz Husain Khan v. Prag Narain*, 29 ALL. 339; (34 I. A. 102 P. C.), where they lay stress on the necessity for final adjudication and observe that otherwise there would be no end to litigation and justice would be defeated. This doctrine of *lis pendens* is expounded in Story's Equity Jurisprudence, Vol. I, §. 406, in the terms following:

"Ordinarily, it is true, that the decree of a Court binds only the parties and their privies in representation or estate. But he who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title Where there is a real and fair purchase, without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, *pendente lite, nihil innovetur*; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them."

[13] It is also settled law that in the absence of fraud or collusion the doctrine of *lis pendens* applies to a suit which is decided *ex parte* or by compromise. If the compromise has not been fairly and honestly obtained, the suit which ended in a compromise will not operate as *lis pendens*. This is the doctrine of *lis pendens*.

[14] These principles are quite clear, and we have got to determine whether in the event of a conflict arising between the rule of *res judicata* and the doctrine of *lis pendens* either the one or the other should prevail. As has been observed before, the rule of *res judicata* rests on the necessity of having a finality in litigation, and so does the doctrine of *lis pendens*. Both have the same end in view, the former that as between the same parties, or their representatives-in-interest litigating under the same title, once the decision is reached in a suit, the same question shall not be canvassed in any other suit, and the latter that whatever the party may choose to do by way of transfers *pendente lite*, the transferee *pendente lite* shall be bound by the result of the litigation. There is, however, this difference between the two that the rule of *res judicata* is concerned with more actions than one, whereas the doctrine of *lis pendens* is concerned with the very same suit during the pendency of which there is an alienation of the right, title and interest of one of the parties thereto. In the case of *res judicata*, the same cause of action may sustain various actions simultaneously, but once the cause of action is merged in the judgment pronounced in a previously decided suit, there is no cause of action left to sustain the second suit. In the case of *lis pendens*, however, the cause of action continues as it was,

sustaining the suit which has been filed for the adjudication of the rights of the various parties thereto and the doctrine applies during the pendency of that suit sustained on that cause of action. Whatever be the transfers *pendente lite*, they do not affect the result of the litigation *qua* the parties to the suit, and the transferee *pendente lite* is bound by the result of that litigation, irrespective of whatever has happened between his transferor and himself. Once, however, even in the case where the doctrine of *lis pendens* applies a judgment is pronounced and the cause of action is merged in the judgment, that judgment is the final pronouncement which binds not only the parties to the suit but also the transferees *pendente lite* from them. The conveyance is treated as if it never had any existence. As Story has put it in the passage above quoted, the effect of it is not to annul the conveyance but only to render it subservient to the rights of the parties in the litigation. Whether this decision is reached in the same suit or in a different one and whether the cause of action which sustained the suit in which the doctrine of *lis pendens* applies was merged in the judgment pronounced in the very same suit or in another one, the position would be that that decision would determine the rights of the parties and would be binding on them as well as the transferees *pendente lite* from them. The transferee *pendente lite* would be legitimately treated as the representative-in-interest of the parties to the suit and the judgment which has been pronounced, whether in the same suit or in another, would be determinative of the rights of the parties. There would be then no *lis* or action which would survive. The *lis* or action can only be sustained by a cause of action. If the cause of action was merged in a judgment duly pronounced by a competent Court there would be no more occasion for any *lis* to continue pending. If a judgment duly pronounced on that particular cause of action was to merge the cause of action in itself, that judgment would govern the rights of the parties, whether it is pronounced in the same suit in which the doctrine of *lis pendens* applies or in any other. If it is in the same suit, there would be no question of the applicability of the rule of *res judicata*. The rule of *res judicata* would come into operation only if it was pronounced in another suit which came to be decided earlier than the one in which the doctrine applied. But once that judgment was pronounced it would have the effect of finally determining the rights of the parties and the cause of action which would sustain the suit in which the doctrine of *lis pendens* applied would be merged in the judgment duly pronounced in what may be described as the

previously decided suit. In our opinion, therefore, the rule of *res judicata* prevails over the doctrine of *lis pendens* and we have come to the conclusion that once a judgment is duly pronounced by a competent Court in regard to the subject matter of the suit in which the doctrine of *lis pendens* applies, that decision is *res judicata* and binds not only the parties thereto but also the transferees *pendente lite* from them.

[15] Under the circumstances of the case before us, there is no getting away from the conclusion that the decision in Suit No. 551 of 1910 was a decision in respect of the right, title and interest of the parties thereto in the suit properties which were matters directly and substantially in issue in that suit which was a previously decided suit and was therefore *res judicata* and barred the decision of the same matters which were directly and substantially in issue in Suit No. 438 of 1911 between the same parties or between parties under whom they claimed and litigating under the same title. After 4th August 1915, there was no question of the applicability of the doctrine of *lis pendens* and the matters were concluded between the parties or their representatives in-interest, so far as the question of the right, title and interest of the respective parties in the suit properties was concerned. The matter could not be any further canvassed in Suit No. 438 of 1911 or the First Appeal No. 84 of 1934 therefrom, and whatever was done by the parties thereafter in that suit was of no consequence whatever. The compromise decree which was obtained on 15th December 1937, in *Digambar Hanmant's case*, First Appeal No. 84 of 1934, had not the effect of in any manner whatever modifying the rights of the parties as they had been declared by the judgment duly pronounced in Suit No. 551 of 1910 on 4th August 1915.

[16] In view of the conclusion above reached, we think it unnecessary for us to go into the further question whether the compromise decree dated 15th December 1937, in *Digambar Hanmant's case*, (F. A. No. 84 of 1934) was obtained by fraud or collusion or whether the defendants had perfected their title by adverse possession. Whatever be the rights of the parties in respect of the said matters may be the subject of further litigation between the parties if they are so advised. We are not concerned with the same in this appeal before us. The only question which we have got to consider is whether the decree in Suit No. 551 of 1910 bars the present suit as *res judicata*, and we have come to the conclusion that so far as this question is concerned, the decision reached by the learned Civil Judge in that behalf was right.

[17] In the result, the appeal fails and will be dismissed with costs, one set allowed.

[18] Dixit J. — I agree. The point to be decided is: When there is a conflict between the rule of *res judicata* and the doctrine of *lis pendens*, which of the two should prevail.

[19] As far as I am aware, there does not seem to be any decided case of this Court upon the point and none of the advocates has been able to discover any.

[20] Now, the rule of *res judicata* enacted in S. 11, Civil P. C., is based upon the consideration of the hardship to the individual and also upon the larger consideration of public policy. The doctrine of *lis pendens* enacted in S. 52, T. P. Act, is, I think, based upon expediency, that is, upon the consideration of hardship that may be caused to a party by the opposite party transferring the property pending the suit so as to defeat the right of the first party. The principles underlying these sections have been stated in the leading cases referred to by my learned brother and it is, therefore, unnecessary to reproduce them again. The position then is that while *res judicata* prevents the Court from entering into an enquiry as to any matter already adjudicated upon, *lis pendens* really affects the transferee *pendente lite*.

[21] I think, therefore, that when the conflict arises, the rule of *res judicata* should prevail.

R.G.D.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 373 [C. N. 97.]

RAJADHYAKSHA AND CHAINANI JJ.

Emperor v. Fakirmahomed Currimji Lalji Sajan — Accused.

Criminal Appeal No. 720 of 1948, Decided on 11th March 1949, against order of Presidency Magistrate, 19th Court, Esplanade, Bombay.

Bombay Smoke-nuisances Act (VII [7] of 1912), Ss. 9 (1) and 11 — Rules under S. 11 — Smoke Nuisance Rules, R. 26 — Accused, owner of hotel, served with notice requiring him to raise height of his chimney to 83 feet — Non-compliance with notice — Contravention of R. 26 by emitting smoke at height lower than 100 feet from firing-floor level — Accused held committed offence under S. 9 (1) read with R. 26 — Fact that accused was merely lessee of building and was precluded from making structural alterations under his contract with landlord was immaterial.

The accused who was an owner of a hotel was served with a notice requiring him to raise the height of his chimney to 83 feet. The accused refused to comply with the notice and raised several objections but ultimately the Smoke Nuisance Commission confirmed the notice. The accused was subsequently prosecuted for contravening R. 26, Smoke Nuisance Rules read with S. 9 (1) of the Act by allowing smoke to be emitted from the chimney at a lower altitude than 83 feet as per requirement of the Smoke Nuisance Department. The Magistrate acquitted the accused on the ground that the requisition of the department being unreasonable, non-compliance with such requisition was not an offence. On appeal:

Held that the charge against the accused was for having contravened R. 26 and not for non-compliance

with the notice served by the department. Though the notice calling upon the accused to raise the chimney to 83 feet did not strictly comply with R. 26, which prohibited the emission of smoke at a lower altitude than 100 feet, the notice merely meant that if notice was complied with no further action against the accused would be taken although in law he had committed an offence. But if the notice was not complied with, the prosecution would be, not for non-compliance with the notice, but for non-compliance with the provisions of R. 26 unless the case comes within one of the various provisos mentioned in that rule: [Para 3]

Held further that though the accused was merely a lessee of the building he could not be heard to say that his private contract with the landlord precluded him from raising the chimney. The department was not directly concerned with the private agreement between the landlord and the tenant. If it was of the opinion that public interest demanded that no smoke shall be emitted below the height of 83 feet, then that direction must be complied with. If the accused felt himself bound by the terms of his contract with his landlord, he must devise some other means by which smoke will not be emitted at a height below 83 feet from the firing-floor level. The accused was therefore clearly guilty of the offence under S. 9 (1) read with Rule 26. [Paras 8 and 9]

C. K. Daphtary, Advocate-General and H. M. Choksi, Govt. Pleader — for the Government of Bombay.
H. R. Pardiwalla and S. Narayanahya —
for Accused.

Rajadhyaksha J.—This is an appeal by the Government of the Province of Bombay against the order of acquittal passed by the Presidency Magistrate, 19th Court, Esplanade, Bombay, acquitting the opponent under S. 9 (1), Bombay Smoke Nuisances Act of 1912, for breach of R. 26 of the Rules under that Act. It is alleged that in contravention of the provisions of the rule the chimney of the opponent's hotel emitted smoke at the lower altitude than that permitted by the law, on 10th, 13th and 16th February 1948, between certain hours as specified in the complaint.

[2] The opponent, who was the accused before the lower Court, is the proprietor of Pyrke's Apollo Hotel situated in a building known as Bright Land on the Lansdowne Road, Apollo Bunder. On the first floor of that building is the kitchen of the hotel, which is about 12 feet from the ground. In that kitchen there is a cooking range with ovens, and in order to allow the smoke coming up from the ovens to go out there was a chimney about 62½ feet high from the firing-floor level. This chimney has been in existence for several years. In the month of May 1947, and again in the month of June 1947, Mr. Patel, who lives in a building adjoining, complained to the smoke nuisance authorities about the nuisance arising from emission of smoke from the chimney belonging to the opponent. On investigation, the Smoke Nuisance Inspector served a requisition on the opponent accused to raise the height of the chimney to 83 feet from the firing-floor level. This notice was served on

the accused on 9th July 1947. Thereupon there was a protracted correspondence between the smoke nuisance department and the accused, in which the accused raised several objections to the compliance with the notice issued to him by the Inspector. Among the objections that were then taken were the contention that the oven from which the smoke was emitted was not a furnace within the meaning of the Act, that the chimney was in existence for a long time, that he was not bound to raise the height of it, as he was only a lessee of the building, that it was the landlord who should have been called upon to raise the height of the chimney, that the smoke nuisance department should furnish the accused with details of the registration of the chimney, when it was originally constructed, and so on. He also asked for the matter being placed before the Smoke Nuisance Commission and for their orders being obtained in the matter. Eventually the matter was placed before the Smoke Nuisance Commission, and the Inspector of Steam Boilers and Smoke Nuisance informed the accused on 29th September 1947, that the Commission had approved of the notice issued to him on 9th July 1947, and advised the accused that failing compliance with the instructions he would be prosecuted under R. 26, Bombay Smoke Nuisance Rules. The Inspector further informed the accused that there was no record of the chimney being registered in the name of the Pyrke's Hotel after the hotel was transferred from its original building on the other side of the road to the building where it is now located. The two letters, Exs. C and G, dated 9th July 1947 and 29th January 1948, respectively gave the statutory warning, the details of which were attached to the notice Ex. G. The Inspector requested the accused to comply with the requirements of the department within the time limit stipulated by the Board. Eventually a complaint was lodged against the accused on 8th March 1948. Even before the proceedings commenced, it appears that the learned Magistrate tried to see whether a settlement could be brought about by raising the chimney to a certain height. The accused agreed to increase the height by about 10 feet, but, as this was not a proper compliance with the requirements of the law and the notice served upon the accused, the prosecution proceeded. The accused, in addition to raising contentions based on the interpretation of the Act and the rules, led evidence to show that, in accordance with the advice, which he had received from one or two architects, it would have been positively dangerous to construct a chimney to the height required by the department, and that the building might not be able to support the weight of a chimney of the height

required. The learned Magistrate on a consideration of the evidence came to the conclusion that in view of the evidence led by the defence "it was up to the prosecution to prove that what was required by the prosecution to be done by the accused was not wanton, unreasonable and difficult of performance according to the necessities of the things."

He then referred to the evidence given by the two architects on behalf of the defence, and came to the conclusion that the requisition made by the department was unreasonable, wanton and unjust. He expressed his view that as the chimney was an old one, the department should impose "such conditions as were practicable and reasonable of performance." In his opinion the prosecution had failed to show that the requisition was reasonable and necessary. He, accordingly, held that non-compliance with such a requisition could not be considered as an offence. He, therefore, acquitted the accused on all the three counts. It is against this order of acquittal that Government have come in appeal.

[3] It was argued by the learned Advocate General, who appeared in support of the appeal, that the learned Magistrate had entirely misconceived the real nature of the charge brought against the accused. He argued that the charge against the accused was not of breach of the order issued by the Inspector of Smoke Nuisance with the sanction of the Smoke Nuisance Commission, but that the charge against him was of non-compliance with the requirements of R. 26 of the Smoke Nuisance Rules. We think that this submission must be accepted. Under S. 3 of the Act:

"Furnace" means any furnace or fire-place used —

- (a) for working engines by steam, or
- (b) for any other purpose whatsoever:

Provided that no furnace or fire place—

- (i) used for the burning of the dead;
 - (ii) used in a private house for domestic purposes other than the purpose specified in clause (a);
- shall be deemed to be a furnace or fire-place within the meaning of the Act."

Under sub-s. (5) the word 'owner', when used in reference to a furnace, includes any agent or lessee using the furnace flue or chimney. Section 9 of the Act provides:

"(1) If smoke be emitted from any furnace in greater density, or at a lower altitude, or for a longer time, than is permitted by rules made under this Act, the owner of the furnace shall be liable to fine (which is prescribed in that section)."

Section 11 of the Act empowers the Provincial Government to frame rules, *inter alia*, to

"(f) prescribe the altitude below which smoke may not be emitted from a furnace; and

(h) prescribe a procedure for the giving of warning to offenders before instituting a prosecution under this Act, and declare the minimum period which should be allowed to elapse in different classes of cases between the giving of such warning and the institution of a prosecution."

In pursuance of the power given under certain sections rules have been framed, of which Rr. 26 and 27 run as under:

"26. *Altitude of chimneys from which smoke may be emitted.*—Smoke shall not be emitted from a furnace at a lower altitude than 100 feet from the firing-floor level:

Provided that this rule shall not apply in the following cases—

(1) Existing chimneys that are, in the opinion of the Commission, of sufficient height for the purpose of the Act.

(2) Furnaces in portable or travelling engines.

(3) Furnaces of engines which, in the opinion of the Commission, are intended for temporary purposes.

(4) Furnaces in steam-vessels.

(5) Any other furnaces especially exempted by the Commission.

27. *Issue of warning by Inspectors.*—When it appears to an Inspector that an offence has been committed under the Act in respect of any furnace, he may serve the owner of such furnace with a written warning by registered post. Such warning shall inform the owner of the furnace of the time and date of such offence, and shall be accompanied by a copy of the record of the observation taken, and it shall inform the owner that if the offence is again committed after the expiry of a period, which shall not be less than 10 days, he will be liable to prosecution under the Act."

Then follow certain provisos, which it is not necessary to quote for the consideration of the case before us. The charge framed against the accused was:

"That you being the proprietor of Pyrke's Apollo Hotel, situated at Lansdowne Road, Apollo Bunder at Bombay, on 10th February 1948, did allow to emit smoke from a chimney of your furnace at a lower altitude than 83 feet from the firing-floor level as per requirement of Smoke Nuisance Department and committed breach of R. 26, Bombay Smoke Nuisance Act of 1912 under S. 9 (1) of the said Act."

It would thus appear that the charge against the accused was for having contravened the provisions of R. 26 of the Smoke Nuisance Rules. It is true that the charge does refer to a certain notice, according to which the accused was asked to raise the height of the chimney to 83 feet from the firing-floor level, but in a sense the charge against him is for having allowed smoke to emit from his chimney at a height below 100 feet, which is the requirement of R. 26. It was strenuously argued by Mr. Pardiwalla for the defence that the charge should be read with the notice which was given to him, and that it should be construed as a charge for having disobeyed the requirements of the notice. In any case, he argued that permitting the accused to emit smoke at a height of 83 feet from the firing-floor level was not in terms identical with the requirements of R. 26, which says that smoke shall not be emitted from a furnace at a lower altitude than 100 feet from the firing-floor level unless exempted under Excepn. (1) or (5). In our opinion, when the rules say that no smoke shall be emitted from a furnace at a lower altitude than

100 feet from the firing-floor level, it means that, strictly speaking, an offence would be committed whenever smoke is emitted from a furnace at a lower altitude than 100 feet from the firing-floor level unless any of the exceptions apply. But it does not mean that in every case the smoke nuisance department would undertake prosecution. It is within the power of the Smoke Nuisance Department to permit the emission of smoke at a lower altitude than 100 feet from the firing-floor level by the simple device by not taking any steps in such cases. What the department has done by the issue of a notice in this case is that it has called upon the accused to raise the height of the chimney to 83 feet, in which case, though the requirements of R. 26 would not be strictly complied with the department undertook that no prosecution would be resorted to. But the prosecution would be, not for non-compliance with the notice to raise the height of the chimney to 83 feet, but for non-compliance with the provisions of R. 26, which says that no smoke shall be emitted from a furnace at a lower altitude than 100 feet from the firing-floor level, unless the case comes within the various provisos mentioned in that rule. Emission of smoke at a height of 83 feet from the firing-floor level was emission of smoke at a height lower than 100 feet from the firing-floor level; but the notice of the Smoke Nuisance Inspector merely means that, if the notice was complied with, no further action would be taken against the accused, although in law he had committed an offence. We consider that the learned Magistrate really misconceived the real nature of the offence with which the accused was charged. If the learned Magistrate had realised that the offence with which the accused was charged was of non-compliance with the requirements of R. 26 of the Smoke Nuisance Rules, we dare say that the learned Magistrate would not have considered in such great detail whether the requirements of the notice served upon the accused were reasonable or unreasonable, just or unjust. If the accused considered that the notice served upon him was unreasonable or unjust, it was not incumbent upon him to comply with that notice; it was open to the accused to prevent the emission of smoke at a height lower than 100 feet from the firing-floor level by resorting to other means of cooking such as installing gas ranges or electric ovens. If he had done so, he could not possibly have been prosecuted for non-compliance with the notice, and he would have committed no offence under R. 26, Smoke Nuisance Rules. Even if the only means of complying with R. 26 was to close down the hotel, we consider that it would be within the power of the Smoke Nuisance

Department to insist—even in such eventuality—on smoke not being emitted at a height lower than 100 feet from the firing-floor level or such other height which the department may consider reasonable. We have no reason to think that the department would be so unreasonable as to demand compliance with terms which are unjust and unreasonable. From the correspondence itself we find that, although the accused has taken various objections based on the proper interpretation of the Act and the rules thereunder, he had not really brought to the notice of the department that the construction of a chimney to the height required by the department was not possible or was going to create difficulties. We have no doubt that if all these difficulties which the accused apprehends had been brought to the notice of the department, some solution satisfactory to both the department and the accused might have been arrived at.

[4] The other contentions of Mr. Pardiwalla may be dealt with briefly. He argued that the statutory warning contained in Ex. G dated 29th January 1948, did not comply with the requirements of R. 27, Smoke Nuisance Rules. But Ex. G is merely a forwarding letter; the statutory warning was contained in the accompaniment to that letter. The warning does show that all the details required to be given in a statutory warning under R. 27 have been strictly complied with.

[5] Mr. Pardiwalla then argued that the conditions imposed by the department were mala fide, inasmuch as only Mr. Patel had complained about the nuisance, and even he had said that the raising of the height of the chimney by about 8 or 10 feet would prevent the nuisance so far as he was concerned. It was further pointed out that the chimney had been emitting smoke at that height for good many years without any complaint from any member of the public, apart from Mr. Patel. The Smoke Nuisance Department cannot obviously keep a watch on each and every chimney in this big City, but once the existence of a nuisance is brought to the notice of the department, it is for the Smoke Nuisance Commission to give directions as to the height to which the chimney should be raised so as to mitigate the nuisance. The Commission had obviously the larger interest of the public before their mind and not that of Mr. Patel alone. The Act makes no provision for the reasonableness of the Commission's decision being questioned, and a statutory authority like the Smoke Nuisance Commission may be expected to issue orders which are not unreasonable.

[6] In this connection Mr. Pardiwalla invited our attention to the evidence of the two architects, who have been examined on behalf of the

accused. They have said that the requisition made by the department is unreasonable; and one of the architects says that the erection of the chimney to the height required by the department might be positively unsafe. Apart from the question, whether it is open to this Court to question the propriety of the order issued by the Smoke Nuisance Commission, it does not appear from the correspondence that these difficulties were brought to the notice of the authorities. If they had been so brought to their notice, we have no doubt that some kind of solution might have been found, which was satisfactory both to the department and the accused.

[7] It was further contended that during the course of the correspondence even reasonable requests made by the accused for information had not been complied with; and in this connection special reference was made to the fact that information was asked for as regards the chimney as it was originally constructed before the accused shifted his Pyrke's Apollo Hotel to the present building. But it would appear from the letter of the Inspector of the Steam Boilers dated 29th September 1947, addressed to the accused that he was informed that :

"Pyrke's Hotel was originally situated on the opposite side of the road and at that time the chimney 70 feet in height was registered by this Department in its name. There is no record of a chimney being registered in its name after the transfer of premises."

It was argued that this statement does not specifically indicate that the answer given by the department related to the chimney in question. But it would appear from the reply given by the accused dated 8th October 1947, that he understood the letter dated 29th September 1947, as referring to the chimney in question. He says :

"It now appears from your letter that this chimney which was erected before my lease, was erected without the authorities having obtained or required plans for approval as provided in the Act."

It is, therefore, not correct to contend that no answer was given by the department to the enquiry made by the accused.

[8] Lastly, it was argued that the accused being a lessee had no power to make alterations in the building belonging to the landlord, and that his contract with the landlord precluded him from making any structural alterations to the building. Apart from the fact that the precise terms of the agreement between the accused and his landlord have not been produced before the Court, the evidence of the landlord shows that he had no objection to the accused carrying out structural changes as required by Government, provided the accused took the responsibility of making the structure safe to all concerned and that he did so at his own risk. We understand that whole of the

building has been leased to the accused for the purpose of the hotel. There can be no doubt that the definition of the word "owner" includes a lessee. The department is not directly concerned with the private agreement between landlord and his tenant. If it is the opinion of the Commission that public interest demands that no smoke shall be emitted below the height of 83 feet, then that direction must be complied with; and a lessee cannot be heard to say that his private contract with his landlord precludes him from raising the height of the chimney. If he felt himself bound by the terms of his contract with his landlord, he must devise some other means by which smoke will not be emitted at a height below 83 feet from the firing floor level.

[9] We are, therefore, of opinion that the accused is guilty of all the three charges levelled against him. Government have come in appeal primarily for the purpose of getting a decision from this Court as regards the legality of the orders issued by the department, which were impugned by reason of the order of acquittal passed by the learned Magistrate. Hence the learned Advocate-General has left the question of sentence to the discretion of this Court. As the matter is before this Court for the purpose of getting an interpretation from this Court as regards the legality of the directions issued under the Act, we think that the imposition of a nominal fine of Rs. 10 in respect of each of the three charges would suffice.

[10] We, accordingly, set aside the order of acquittal passed by the lower Court and convict the accused on each of the three charges and sentence him to a fine of Rs. 10 in respect of each of them.

K.S.

Order set aside.

A. I. R. (36) 1949 Bombay 377 [C. N. 98.]

CHAGLA C. J. AND TENDOLKAR J.

Raghuvanshi Mills Ltd. — Applicant v. Commissioner of Income-tax, Bombay — Respondent.

Income-tax Ref. No. 5 of 1948, Decided on 18th March 1949.

Income-tax Act (1922), Ss. 2 (6c) and 10 (2) — 'Income' — 'Consequential loss policies' indemnifying loss of profits due to fire — Claim received under such policies is revenue receipt subject to tax and not windfall.

The assessee, a manufacturing company, had taken out 'consequential loss policies' which indemnified the company against any loss of profits which might result as a consequence of any fire that may break out in their mills. A fire broke out in the mills resulting in destruction of buildings and consequent cessation of manufacturing activities of the company. The assessee receives two sums from the insurance company in respect of the above policies:

Held that the sums so received were not in the nature of windfall but revenue receipts as they represented

the profits which the company would have earned but for the fact of fire having broken out. They were, therefore, the company's income within the meaning of Income-tax Act and liable to income-tax: A. I. R. (19) 1932 P. C. 121, *Rel. on.* [Paras 3, 4 and 5]

Sir Jamshedji Kanga, C. K. Daphtary, Advocate-General and K. T. Desai—for Applicant.

G. N. Joshi and N. A. Palkhivala—for Respondent.

Chagla C. J.—The question that arises in this reference is whether the two sums of Rs. 8,25,000 and Rs. 5,75,000 received by the assessee, the Raghuvanshi Mills, Ltd., Bombay, on 8th September 1944, and on 22nd December 1944, respectively, are subject to tax.

[2] The company came to receive these two sums in these circumstances: A fire broke out in the company's mills on 18th January 1944, with the result that the buildings, etc., were destroyed and there was a cessation of the manufacturing activities of the company. The company had taken out a policy with the South India Fire and General Insurance Company, Limited, and with other insurance companies of the nature known as "consequential loss policies." These policies indemnified the company against any loss of profits which might result as a consequence of any fire that may break out, and it is not disputed before us that these two sums were received by the assessee company as an indemnity for the loss suffered by them of their profits because of the cessation of the company's activities as a manufacturing company.

[3] Sir Jamshedji's contention is that these sums are not liable to tax because they do not represent the profits earned by the assessee but they have been received on an indemnity and they should be looked upon more as a windfall than as something earned during the course of the business of the company. In my opinion that contention is fallacious. These sums received by the company represent the profits which the company would have earned but for the fact of the fire having broken out. They take the place of the profits which would normally have been earned by the company and clearly as profits which would also be available for distribution to the shareholders of the company. They do not represent a windfall because the company was careful and cautious enough in the course of its business to insure itself against the contingency of a fire breaking out. But it is unnecessary to labour this point because this very question was considered by the Privy Council in *Rex v. B. C. Fir and Cedar Lumber Co.*, (1932) A.C. 441: (A. I. R. (19) 1932 P. C. 121) and the conclusion they came to was the same as the conclusion reached by the Income-tax Appellate Tribunal from which this reference has been preferred. In that case also the company was insured against loss of profits.

A fire had broken out with the result that it made it impossible for the company to earn profits and the company received the amount of the policy from the insurance company; and their Lordships of the Privy Council took the view that the insurance receipt was the product of a revenue payment prudently made by the respondents to secure that the gains which might have been expected to accrue to them had there been no fire should not be lost, but should be replaced by a sum equivalent to their estimated amount. Their Lordships also took the view that the receipt was one of which it could fairly be said that it arose from the business of the respondents because, in their Lordships' opinion, the receipt was inseparably connected with the ownership and conduct of the respondents' business. Had the respondents not been insured under their main fire policies, these policies would not have been available to them. In the case before their Lordships, the policies were called "use and occupancy policies." Their Lordships also considered the argument advanced before us by Sir Jamshedji that the receipt should be looked upon as a windfall. They rejected that argument holding that it was an ordinary receipt in the sense, not that it would occur every year or regularly at stated intervals, but in the sense that in the case of a business prudently conducted it would ordinarily be received so often as the risk insured against materialized.

[4] Sir Jamshedji has attempted to distinguish this case on the ground that the Privy Council was considering the British Columbia Taxation Act and it would be unwise to apply those observations of the Privy Council based upon the construction of one taxation statute to the provisions of a different taxation statute. But as I read the judgment of the Privy Council, it is not on the construction of any particular section that these observations of the Privy Council are based. The Privy Council has laid down a general principle which is as much applicable to the British Columbia Taxation Act as to our own Income-tax Act, because the definition of "income" under our Act is a very wide one and it covers innumerable cases. I am, therefore, of the opinion that the amount received by the assessee from the insurance company is clearly a revenue receipt subject to tax.

[5] I would only like to add that the question framed by the Income-tax Appellate Tribunal is not in proper form and we would re-formulate the question so as to read:

"Whether in the circumstances of the case, the sum of Rs. 14,00,000 was the assessee company's income within the meaning of the Indian Income-tax Act and liable to pay income-tax under the Indian Income-tax Act?"

[6] Having re-formulated that question, I would answer the question in the affirmative. Assessee to pay the costs.

Tendolkar J. — I agree.

K.S. *Answer accordingly.*

A. I. R. (36) 1949 Bombay 379 [C. N. 99.]

CHAGLA C. J. AND DIXIT J.

Walchand Ramchand Kothari — Defendant 1—Appellant v. Yeshwant Deorao Deshmukh—Plaintiff—Respondent.

First Appeal No. 281 of 1947, Decided on 27th January 1948, from order of Civil Judge (Senior Division), Poona, in Special Darkhast No. 75 of 1946.

(a) Civil P. C. (1908), S. 48 — Date of decree — Decree directing plaintiff to pay court-fee before execution — Decree not conditional — Limitation starts from date of decree and not from date of payment of court-fee.

After providing for the amount to be paid by the defendants to the plaintiff, a decree ended up by saying that "the plaintiff to pay the deficient court-fee stamp before the execution of this decree." Relying on the language of the decree, it was contended that the decree was a conditional decree and came into operation only when the deficit court-fee was paid :

Held, that the provision in the decree regarding court-fee did not make it conditional. It was capable of execution from the moment it was passed provided plaintiff paid the deficit court-fee. By putting off that payment the plaintiff could not extend the period of limitation. Moreover, the provision in the decree regarding payment of court-fee was redundant in view of S. 11, Court-fees Act. The period of limitation under S. 48, therefore, began from the date of the decree and not from the date of payment of deficit court-fee : A.I.R. (26) 1939 Bom. 75, *Disting.*; A. I. R. (25) 1938 All. 539, *Not foll.*; A. I. R. (29) 1942 Pat. 410, *Ref.*

[Paras 3 and 4]

Annotation : ('44-Com.) Civil P. C., S. 48 N. 11 Pt. 20.

(b) Civil P. C. (1908), S. 48 (2) — Fraud — Word must be interpreted in wider sense — Evading execution by dishonest stratagems amounts to fraud — Judgment-debtor concealing property, putting up benamidar and denying his ownership — Execution held prevented by fraud and not barred under S. 48.

The word 'fraud' must be interpreted in a wider sense than that in which it is generally used in English law. If a judgment-debtor evades execution by dishonest stratagems, it would be sufficient to constitute fraud within the meaning of S. 48, Civil P. C. Thus where a judgment-debtor attempted to conceal his property, to deny its ownership and to put forward a mere benamidar as its real owner, it was held that it amounted to a dishonest stratagem on the part of the judgment-debtor and the execution of the decree being thus prevented by fraud was not barred by limitation under S. 48 : 9 Bom. 318, *Rel. on.* [Para 5]

Annotation : ('44-Com.) Civil P. C., S. 48 N. 15, Pts. 8, 9.

(c) Limitation Act (1908), S. 14 (2) — 'Same relief' — Application in Court without jurisdiction must be for 'same' relief, and not for 'similar' relief — Application for adjudging judgment-debtor insolvent is not for same relief as application for execution of decree — Time spent in insolvency proceedings cannot be excluded under S. 14 (2).

The principle of S. 14 is clear. If a suit or an application instead of being prosecuted in a Court with a jurisdiction is prosecuted in another Court which has no jurisdiction, then the time taken up in the Court without jurisdiction is to be excluded from the period of limitation. But the important thing to note is this that the Court which has no jurisdiction could have granted the necessary relief to the party if it did have jurisdiction. Therefore the suit must be in respect of the same cause of action in the Court without jurisdiction as it is ultimately filed in the Court with jurisdiction and similarly the application must be for the same relief as ultimately prosecuted in the Court with jurisdiction. It is to be noted that the Legislature has advisedly used the expression 'the same relief,' and not 'similar relief,' and it is difficult to accept the contention that an application to adjudge the judgment-debtor insolvent asks for the same relief as the application to execute a decree against the judgment-debtor. Therefore the time spent in prosecution of the insolvency petition by the decree-holder in that Court, although that Court had no jurisdiction, cannot be excluded under S. 14, sub-s. (2), Limitation Act: A.I.R. (30) 1943 Mad. 457, *Dissent.*; A. I. R. (1) 1914 Bom. 247, *Disting.*; A.I.R. (31) 1944 Lah. 136 (F.B.), *Rel. on.* [Para 7]

Annotation : ('42-Com.) Lim. Act, S. 14 N 20.

(d) Limitation Act, (1908), Art. 182 (5) — Step-in-aid — Application under O. 21, R. 53, Civil P. C., to attach decree is not step in execution of decree attached — Such application does not save limitation for holder of attached decree.

When a creditor attaches a decree, he applies for the execution of his own decree and not for the execution of the decree which he seeks to attach. An attachment of a decree cannot, therefore, be a step in execution so far as the holder of the attached decree is concerned and hence the latter cannot avail himself of that application as a step-in-aid to save limitation for the execution of the attached decree under Art. 182, Lim. Act: A.I.R. (21) 1934 Cal. 234. *Rel. on.* [Para 10]

Annotation : ('42-Com.) Lim. Act, Art. 182 N. 120 Pt. 4.

(e) Civil P. C. (1908), S. 42 — Application for recall of transferred decree — Order for recall made — Execution application to transferor Court before return of decree from transferee Court — Transferor Court has jurisdiction to receive application.

Where a decree-holder applies to the Court which passed the decree to recall the decree transferred for execution to another Court and the Court makes an order for its recall, and then the decree-holder applies for execution of the decree in the transferor Court, it cannot be said that the latter Court has no jurisdiction to entertain the application merely because the decree is not returned by the transferee Court. It is not the fault of the decree-holder. Once an order has been made for the recall, then it is merely a matter of proper compliance with it by administrative action and the delay in complying with it on the part of transferor Court is a mere want of formality which cannot affect the jurisdiction of the Court passing the decree to entertain the execution application. [Para 11]

Annotation : ('44-Com.) Civil P. C., S. 42 N. 3; ('42-Com.) Lim. Act, Art. 182 N. 89.

R. N. Bhalerao and V. R. Gadkari — for Appellant.
H. C. Coyajee, R. G. Karnik and Y. V. Chandra-chud — for Respondent.

Chagla C. J. — This is an appeal from an order of the Civil Judge, Poona, by which he directed that the darkhast filed by respon-

dent 1, the decree-holder, should proceed. The facts leading up to this appeal are briefly these.

[2] Respondent 1 filed a partnership suit against the appellant, defendant 1, and respondent 2, defendant 2, in the Court of the Joint First Class Subordinate Judge at Poona and a preliminary decree for accounts was passed on 20th February 1931. The final decree was passed on 6th December 1932. On 5th December 1935, the plaintiff paid the deficit in the court-fee as the full court-fee had not been paid when the plaint was presented, and on the same day he applied for transfer of the decree to the Sholapur Court, and pursuant to that application the decree was transferred on 7th February 1935. He filed a darkbast in the Sholapur Court being Darkbast No. 333 of 1936 on 15th February 1936. The darkbast was struck off on 25th June 1937. He filed another darkbast being Darkbast No. 946 of 1940 on 24th June 1940, and that darkbast was struck off on 9th September 1940. On 3rd December 1945, he applied to the Poona Court for recalling the decree which had been transferred to the Sholapur Court. On 4th October 1946, he filed the present darkbast for execution of the decree on which the learned Judge made the order from which this appeal is preferred.

[3] Three contentions have been raised before us by the appellant, judgment-debtor 1. The first contention is that inasmuch as the decree was passed on 6th December 1932, under S. 48, the decree is time-barred and incapable of execution. The learned Judge below took the view that the decree did not become executable till 5th December 1935, when the deficit in the court-fee stamp was made good, and according to him for the purpose of S. 48 of the Code limitation began to run not from 6th December 1932, but from 5th December 1935. That seems to us to be contrary to the plain language of S. 48. The period of 12 years has to run from the date of the decree sought to be executed and there can be no doubt that the date of the decree in this case is 6th December 1932. It is contended that the decree is a conditional decree and it came into operation only when the deficit court-fees were paid, and the language of the decree itself is relied upon for this argument. After providing for the amount to be paid by defendants 1 and 2 to the plaintiff, the decree ends up by saying that "the plaintiff to pay the deficient court-fee stamp before the execution of this decree." In our opinion, this provision in the decree does not make the decree a conditional decree. The decree was capable of execution from the moment it was passed provided the plaintiff paid the deficit in court-fees. If the plaintiff had chosen to pay the deficit in court-fees on 6th December 1932, he could have executed the

decree on that very day. It is impossible to contend that the plaintiff by putting off the payment of deficient court-fee stamps could extend the period of limitation. Further, it was really unnecessary and redundant to make this provision in the decree itself because under S. 11, Court-fees Act even without such a provision the plaintiff could not have executed his decree without the payment of the deficient court-fees. Mr. Coyajee for respondent 1 has relied on a decision of this Court reported in *Rango v. Gopal*, 40 Bom. L. R. 1278 : (A. I. R. (26) 1939 Bom. 75). In that case a suit was filed by two panchas of the temple of Shri Narsinha against two managers of the temple for accounts on the ground of mismanagement and a decree was passed against these two defendants and the decree directed that the amount should be recovered first from defendant 1 by taking all legal steps against him, and the balance, if any, was to be recovered from defendant 2. The decree was substantially confirmed on appeal by the District Court. This Court in second appeal confirmed the decree of the lower appellate Court but directed that execution should be stayed until the appointment of a receiver was made in another suit under S. 92, Civil P. C., relating to the same temple, which was then pending. That suit was decided subsequently and a committee for management of the temple was appointed and Broomfield and Norman JJ., on these facts held that where a decree is not capable of execution except on the happening of a particular contingency, time under S. 48 of the Code does not begin to run until that contingency occurs, and according to Broomfield J. in his judgment at page 1284, the decree passed by the High Court was not capable of execution at all on its date and S. 48, therefore, could not be said to apply until it became a decree capable of execution, that is to say, until the appointment of a receiver or some other person who had authority to execute it. In our opinion, it cannot be said of the decree which we have before us that it was not capable of execution except on the happening of a particular contingency, viz., the payment of the deficit in court-fees. As we have already pointed out, the decree was capable of execution on the very day it was passed if the decree holder chose to pay the amount which he was liable to pay in respect of the deficit in the court-fees.

[4] Reliance has also been placed by Mr. Coyajee on a decision of the Allahabad High Court in *Babu Ram v. Gopal Sahai*, A. I. R. (25) 1938 ALL. 539 : (I. L. R. (1938) ALL. 848). In that case a decree was passed on condition that the necessary court-fee was deposited. The decree-holder deposited the court-fee only after three

years of the decree. The Court consisting of Bennet Ag. C. J. and Verma J. held that limitation began to run only when the necessary court-fees were deposited and the decree was not complete until such payment and until that date there was no decree which could be executed. This view has not found favour with the Patna High Court. In *Mohammad Sadique Mian v. Mahabir Sao*, 21 Pat. 366 : (A.I.R. (29) 1942 Pat. 410), Rowland and Chatterji JJ., were considering a decree which provided (p. 368) :

"Let final decree be prepared in terms of the Commissioner's report . . . No decree shall be prepared unless deficit court-fees are filed."

And they held that for the purpose of computing limitation the date of the judgment should be taken to be the date of the decree. They considered the decision of the Allahabad High Court and distinguished it on the ground that that Court was perhaps right in holding that it was a conditional decree and until the condition was satisfied the decree was not capable of execution. In our opinion, in this case the period of limitation for purpose of S. 48 is from the date of the decree and not from the date when the decree-holder paid the deficit in court-fees.

[5] It is further contended by the decree-holder that he is entitled to avail himself of sub.s. (2) of S. 48 that permits a Court to order the execution of a decree notwithstanding the passage of 12 years if the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within 12 years immediately before the date of the application. Now the decree-holder's case before the Court below was that the judgment-debtor had concealed his property and had made fictitious transfers in order to perpetrate a fraud upon him and a considerable body of evidence, both oral and documentary, was led on this point. The decree-holder's allegation was that defendant 1 had transferred a newspaper "*Prabhat*" and "*Hindusthan Printing Press*" first in the name of Rajwade and then in the name of Abhyankar. The learned Judge held in his judgment that with regard to *Hindusthan Printing Press* the allegation had not been substantiated by satisfactory evidence and we see no reason to differ from the view taken by the learned Judge. With regard to the newspaper *Prabhat* the position was different. In his written statement the judgment-debtor alleged that he had no concern with or interest in the *Prabhat* newspaper till April 1944. Now it has been clearly established by an agreement dated 25th May 1939, that the judgment-debtor purchased the newspaper *Prabhat* from Pandurang Bhagwat on 1st June 1938, and that it became the concern of the judgment-debtor. It

is also in evidence that although he was the owner he made representations that in fact it was Abhyankar who was the sole proprietor of the newspaper. In the account opened on 24th April 1942, in the United Western Bank, Ltd., Satara, Abhyankar was described as the sole proprietor and Mr. Walchand Ramchand Kothari, the judgment-debtor, was described as the person who was allowed to operate upon the account from the authority derived from Abhyankar. Extracts were also filed from the accounts of other banks which go to show that the accounts were opened in the name of third persons and were actually operated by the judgment-debtor. But the most important point to note in this connection is that in face of these allegations and this evidence the judgment-debtor did not think fit to go into the witness box and the learned Judge was quite right in drawing the strongest inference against the judgment-debtor. In our opinion, the learned Judge was right in coming to the conclusion that the judgment-debtor's case in his written statement that he became the owner of the newspaper only in April 1944 was false and that he had a proprietary interest in that paper from June 1938 to April 1944, and having that proprietary interest he made attempts to represent to the world that he was not the owner but Abhyankar was the owner. The Courts have given to the word "fraud" in S. 48, sub.s. (2), a very wide meaning. As far back as 1885, this Court in *Bhagu Jetha v. Malek Bawasaheb*, 9 Bom. 318, took the view that the word "fraud" must be interpreted in a wider sense than that in which it is generally used in English law, and Sir Charles Sargent C. J. and Birdwood J. said in their judgment that if a judgment-debtor evades execution by dishonest stratagems, that would be sufficient to constitute fraud within the meaning of S. 48. The stratagem in that case was that the judgment-debtor on seeing the Court's bailiff approach his house, left the verandah and went inside the house and chained the door and refused to open it when called on to do so by the bailiff. In this case, in our opinion, the stratagem is much more dishonest. The attempt on the part of the judgment-debtor was to conceal his property, to deny its ownership and to put forward a mere *benamidar* as the real owner of that property. In our opinion, therefore, the execution of the decree is not barred under S. 48. The judgment-debtor has, by fraud, prevented the execution of the decree within 12 years before the date of the application for execution by the decree-holder and therefore the decree under consideration is capable of being executed.

[6] The next contention urged by the judgment-debtor is that the application for execution is barred under Art. 182, Limitation Act. Now

the material date is 9th September 1940, when darkhast No. 946 of 1940 was struck off and the next application as step in execution was made on 3rd December 1945, when the decree-holder applied for recalling the decree and the present darkhast was filed on 4th October 1946. Limitation is sought to be saved, firstly, on the grounds, viz., that the decree-holder was prosecuting another civil application for the same relief in another Court without jurisdiction and that period should be excluded under S. 14. Now, the facts with regard to it are these.

[7] On 10th August 1937, the decree-holder applied for adjudication of the judgment-debtor in the Sholapur Court. On 1st September 1937, the judgment-debtor raised the plea that he was an agriculturist and the Sholapur Court had no jurisdiction. On 25th January 1941, the application was dismissed for default but was restored on 20th November 1941. On 14th December 1942, the Court held that it had no jurisdiction to proceed with the application for adjudication and returned it to the decree-holder to be presented to the proper Court. Now it is contended that the whole period from 10th August 1937, to 14th December 1942, should be excluded as the decree-holder was prosecuting his application for adjudication in a Court which had no jurisdiction. Now the principle of S. 14 is clear. If a suit or an application instead of being prosecuted in a Court with jurisdiction is prosecuted in another Court which has no jurisdiction, then the time taken up in the Court without jurisdiction is to be excluded from the period of limitation. But the important thing to note is this that the Court which has no jurisdiction could have granted the necessary relief to the party if it did have jurisdiction. Therefore the suit must be in respect of the same cause of action in the Court without jurisdiction as it was ultimately filed in the Court with jurisdiction and similarly the application must be for the same relief as ultimately prosecuted in the Court with jurisdiction. Now, can it be said in this case that the application of the decree-holder to adjudge the judgment-debtor insolvent was an application for the same relief as the application for execution now under consideration before us? It is to be noted that the Legislature has advisedly used the expression "the same relief" and not "similar relief", and it is difficult to accept the contention of Mr. Coyajee that an application to adjudge the judgment-debtor insolvent asked for the same relief as the application to execute a decree against the judgment-debtor. To apply the test which we have suggested earlier the Court in which the insolvency proceeding was pending could never have granted the relief which the decree-holder now

seeks in his application for execution for the very simple reason that the decree-holder never asked for that relief from that Court. Therefore the prosecution of the insolvency petition by the decree-holder in that Court, although that Court had no jurisdiction, cannot be, in our opinion, excluded under S. 14, sub-s. (2), Limitation Act. The Madras High Court in *Vaithilinga v. Narayanaswami*, A. I. R. (30) 1943 Mad. 457 : (213 I. C. 27), took the view that in essence a decree-holder who asks the Court to get his judgment-debtor adjudicated insolvent is asking for the same relief as the decree-holder who applies for execution of his decree against his judgment-debtor. King J. who decided this case was of the opinion that the insolvency proceedings were prosecuted in the hope and with the purpose that at some time a dividend would be paid to the decree-holder from the insolvent's estate, and it was, therefore, an application whose ultimate purpose was to receive money. With great respect to the learned Judge, we are not concerned with the object or the ultimate purpose of the application for insolvency made by the decree-holder. What we are concerned to find out is whether the requirements of the section are satisfied, and as we have already pointed out, the statute requires that both the applications must contain the same relief. Even on the facts of the case before King J. the same decision could have been arrived at without invoking S. 14, Limitation Act, because there on the decree-holder's application to the District Court for the adjudication of the judgment-debtor the District Court transferred the application to the Subordinate Judge who adjudicated the judgment-debtor as an insolvent and after nearly five years the District Court recalled the petition to its own file on the ground that the Subordinate Judge had no jurisdiction and annulled the order of adjudication. It seems to us that there is a specific provision in the Provincial Insolvency Act, S. 78, sub-s. (2), which in terms excludes from the period of limitation the period between the date when the order of adjudication was made and the date when the order of adjudication was annulled, and further the order of adjudication would result in the stay of execution proceedings. In this case as there was no order of adjudication the decree-holder was in no way precluded from applying for execution of his decree against his judgment debtor.

[8] A Full Bench of the Lahore High Court has taken a contrary view in *Jai Kishan Singh v. Peoples Bank of Northern India*, I. L. R. (1944) 25 Lah. 451: (A. I. R. (31) 1944 Lah. 136) and they have held that the period spent by a creditor in prosecuting a petition for his debtor's

adjudication as an insolvent cannot be excluded under S. 14, Limitation Act, in computing the limitation prescribed for an execution application. It is true that in that case, with great respect to the learned Judges, it was sufficient to dispose of the case on the fact that the insolvency petition had been dismissed on merits and not for want of jurisdiction and therefore in any view of the case S. 14 would have no application. But the learned Judges have considered the question as to whether the relief sought in the insolvency petition is the same as in the application for execution. They considered the judgment of King J. to which we have just referred and they found themselves unable to agree with the reasons which appealed to that learned Judge. The learned Judges point out at p. 455 of the judgment how different in their very nature are the proceedings in the insolvency Court and the proceedings in execution. With respect to King J. we are inclined to take the same view as was taken by the Full Bench of the Lahore High Court on the true interpretation of the expression "the same relief" as used in S. 14, sub-s. (2), Limitation Act.

[9] A somewhat similar point arose for consideration before a Bench of this Court consisting of Beaman and Heaton JJ. in *Laxmiram v. Bhala Shankar* 16 Bom. L. R. 612 : (A. I. R. (1) 1914 Bom. 247). In that case the Court on the petition of the judgment-debtor adjudged him insolvent and the application for execution of the decree-holder which was then pending was struck off. The decree-holder appealed to the District Court against the order of adjudication and the District Court annulled the order of adjudication. Thereupon the decree-holder again applied for execution. The Court held that the appeal by the decree-holder against the insolvency order was an application to take a step-in-aid of execution within the meaning of Art. 182, Limitation Act. Beaman J. delivering the judgment of the Court frankly confessed that he found some difficulty in holding that the appeal by the decree-holder could be considered as an application to take some step-in-aid of execution. With very great respect to the learned Judges, they seemed to have overlooked the fact that, as in the Madras case time could have been excluded under S. 78, sub s. (2), Provincial Insolvency Act. Further, in this case, it was the judgment-creditor who appealed against the order of adjudication as he wanted to proceed with his application for execution, whereas in our case it is the judgment-creditor himself who applied to get the judgment-debtor adjudicated insolvent. It cannot, therefore, be contended either that the decree-holder's application for adjudication filed on 10th August 1937 was a

step-in-aid of execution or that under S. 14, Limitation Act, he was prosecuting an application for the same relief in a Court without jurisdiction.

[10] The other contention put forward by the decree-holder in order to save limitation is that one Tendulkar obtained a decree in the Small Cause Court at Poona against the decree-holder and for execution of that decree he filed a darkhast (No. 642 of 1940) on 3rd April 1940. In that darkhast he prayed for attachment of the decree-holder's decree against the judgment-debtor. It seems that an order for attachment was made but it does not appear clearly from the record when that order was made. But on 5th February 1941, the darkhast was disposed of and Tendulkar was ordered to file a fresh execution application in respect of the decree attached and the attachment of the decree was ordered to continue, and on 4th February 1944, Tendulkar made an application for the execution of the decree of the decree-holder against the judgment-debtor. Now it is perfectly true that under O. 21, R. 53, sub-cl. (3), the holder of the decree sought to be executed becomes a representative of the holder of the attached decree and entitled to execute such attached decree in any manner lawful for the holder thereof. The scheme of O. 21, R. 53 is this. Where the property to be attached is a decree, then the decree is to be attached—(a) if the decrees were passed by the same Court, then by an order made by that Court, (b) if the decree sought to be attached was passed by another Court, then a notice has to be issued to such other Court requesting that Court to stay the execution of its decree, and when the Court makes an order under sub-cl. (a) or receives an application under sub-cl. (b), it has to proceed to execute the attached decree on the application of the creditor who has attached the decree. Therefore, sub-cl. (2) of O. 21, R. 53, requires an application of the creditor of the attached decree before the attached decree can be executed, and after the creditor has made his application for the purpose of execution, he becomes the representative of the holder of the attached decree. Mr. Coyajee contends that when Tendulkar attached the decree of the decree-holder in 1940, he took a step in execution as the representative of the decree-holder and therefore the decree holder can avail himself of that step in execution. But in our opinion that contention is fallacious because when Tendulkar applied in 1940 for attachment of the decree-holder's decree, he was applying for execution of his own decree, and not for execution of the decree holder's decree. That application he made only on 4th February 1944, and when he made that application, it may be that he could be considered as

the representative of the decree-holder and that application could be availed of by the decree-holder, but that being only on 4th February 1944, that does not help the decree-holder to save the period of limitation under Art. 182. If any authority was needed for the proposition that an attachment of a decree is not a step in execution as far as the holder of the attached decree is concerned, that is to be found in *Anilkumar Ghosh v. Hemantakumar Ghosh*, 60 Cal. 1357: (A. I. R. (21) 1934 Cal. 234). Therefore, as far as Art. 182 is concerned, the position is that the last application for execution was made by the decree-holder on 24th June 1940, which was struck off on 9th September 1940, and after that date the next application for execution or to take some step-in-aid of execution is on 4th February 1944, that being Tendulkar's application to execute the decree against the judgment-debtor. When that application was made, execution was already barred under Art. 182 and, therefore, in our opinion the present darkhast which is filed on 4th October 1946, is equally barred under the same Article. We differ from the learned Judge who takes the view that limitation is saved under S. 14 by reason of the insolvency proceedings to which we have already referred.

[11] The third contention urged by the judgment-debtor is that the Poona Court has no jurisdiction to entertain the darkhast filed by the decree-holder. Mr. Bhalerao contends that the decree has been transferred to the Sholapur Court and till its return the Poona Court has no jurisdiction to maintain the darkhast. Now as we have already said, the darkhast was filed after the Poona Court made an order recalling the decree on 3rd December 1945. If in fact the decree has not yet been retransferred to the Poona Court, it is not the fault of the decree-holder. Once an order has been made as it was made in this case, then it is merely a matter of proper compliance with it by administrative action and the delay in complying with it is a mere want of formality which cannot affect the jurisdiction of the Poona Court to entertain the application. In view of this, it is unnecessary to go into the interesting question whether by reason of the fact that the decree was transferred to the Sholapur Court the Poona Court was divested completely of its jurisdiction and whether although the Sholapur Court might be the proper Court for the purpose of application for execution, the Poona Court ceases to be a Court with jurisdiction. As we have said, under the circumstances of this case the necessary order having been made for re-transfer of the decree from the Sholapur Court to the Poona Court, the Poona Court had jurisdiction to entertain the darkhast and to make the order which it ultimately made.

But in view of our conclusion that the darkhast is barred by limitation under Art. 182, Limitation Act, the appeal must be allowed and the order of the learned Judge set aside and the darkhast dismissed with costs throughout.

D.R.R.

Appeal allowed.

A. I. R. (36) 1949 Bombay 384 [C. N. 100.]

RAJADHYAKSHA AND CHAINANI JJ.

Hansabai Sayaji Payagude—Complainant
v. Ananda Ganuji Payagude—Accused.

Criminal Ref. No. 188 of 1948, Decided on 3rd March 1949, made by Sessions Judge, Poona.

Criminal P. C. (1898), S. 203 — Discharge of accused—Fresh complaint on same facts—Fresh prosecution should not be started in absence of exceptional circumstances—Criminal P. C. (1898), Ss. 253, 403.

While there is nothing in law against the entertainment of a second complaint on the same facts on which a person has already been discharged after consideration of all the evidence produced by the complainant, the Magistrate cannot be said to have sufficient ground for proceeding with the complaint within the meaning of S. 203, unless he is satisfied that some additional evidence is forthcoming, of which the complainant was not previously aware or which it was not within his power to produce in the previous trial, or that there has been manifest error apparent on the face of the record or manifest miscarriage of justice. It cannot be said to be in the interests of justice that a party who has obtained a decision from a Court after a full consideration of his case should be given an opportunity to seek from the same Court or another Court of co-ordinate jurisdiction a different decision on the same facts and on the same evidence. The proper remedy for the complainant, who is dissatisfied with an order of discharge passed under S. 253 (1), is to move the superior Court to set it aside and order further enquiry in the case under S. 436, Criminal P. C. For, otherwise it would be open to a complainant to file a series of complaints on the same facts, a new complaint being brought as soon as or shortly after the accused has been discharged in the previous case, and thus continue indefinitely the harassment of the accused: *Case law relied on.* [Para 2]

Annotation: ('46-Com.) Criminal P. C., S. 403, N. 13.

M. B. Mankad—for Complainant.

H. M. Choksi, Government Pleader—for the Crown.

Chainani J.—The facts of this case briefly are that on 8th September 1946, the complainant Hansabai filed a criminal complaint against the accused under Ss. 447 and 504, Penal Code, and S. 24, Cattle Trespass Act, before the First Class Magistrate, Haveli. This was dismissed as she was absent on the date of the hearing. Thereafter she brought a fresh complaint in the same Court. After recording the evidence adduced by her, the Magistrate discharged the accused on 5th March 1947. A fortnight later, on 18th March 1947, the complainant filed a third complaint on the same facts against the accused. This was transferred to the Third Class Magistrate, Haveli. The Magistrate decided to inquire into the case again and issued summonses to the accused.

After the evidence, which the complainant produced, had been taken, the accused applied to the Magistrate that no charge should be framed, as he had previously been discharged on the same evidence. The Magistrate did not accept this argument and on 15th November 1947, framed a charge against the accused and passed an order that the case should proceed. On 9th December 1947, the accused made a revision application to the Sessions Judge, Poona, in which he requested that the order passed by the Magistrate on 15th November 1947, should be set aside. The Sessions Judge has made a reference to this Court, recommending that the proceedings pending before the Magistrate should be quashed.

[2] It is now well-settled that the discharge of an accused person does not operate as a bar to the institution of fresh criminal proceedings against him for the same offence, and that it is competent for a Magistrate to entertain another complaint on the same facts and to enquire again into the case against the accused. (See *In re Mahadeo Laxman*, 27 Bom. L. R. 352: (A. I. R. (12) 1925 Bom. 258: 26 Cr. L. J. 991), *Emperor v. Amanat Kadar*, 31 Bom. L. R. 146: (A. I. R. (16) 1929 Bom. 134: 30 Cr. L. J. 594) and *Alimahomed v. Kasturchand*, 41 Bom. L. R. 90: (A. I. R. (26) 1939 Bom. 89: 40 Cr. L. J. 346). The Third Class Magistrate, Haveli, was, therefore, competent to entertain the third complaint brought by the complainant against the accused. Section 203, Criminal P. C., provides that the Magistrate before whom a complaint is made may dismiss the complaint, if after considering the statement of the complainant and the result of the investigation or inquiry under S. 202, if any, there is, in his judgment, no sufficient ground for proceeding. In coming to a decision whether there is sufficient ground for proceeding with the complaint the Magistrate must take into consideration previous proceedings, if any. Where an accused person has been discharged after consideration of all the evidence produced by the complainant, and a fresh prosecution is instituted thereafter on the same facts, the Magistrate cannot be said to have sufficient ground for proceeding with the complaint unless he is satisfied that some additional evidence is forthcoming, of which the complainant was not previously aware or which it was not within his power to produce in the previous trial, or that there has been manifest error apparent on the face of the record or manifest miscarriage of justice. It cannot be said to be in the interests of justice that a party who has obtained a decision from a Court after a full consideration of his case should be given an opportunity to seek from the same Court or another Court of co-ordinate jurisdiction a different decision on the same facts and on the same evidence. The proper remedy

for the complainant, who is dissatisfied with an order of discharge passed under S. 253 (1), is to move the superior Court to set it aside and order further enquiry in the case under S. 436, Criminal P. C. For, otherwise it would be open to a complainant to file a series of complaints on the same facts, a new complaint being brought as soon as or shortly after the accused has been discharged in the previous case, and thus continue indefinitely the harassment of the accused.

[3] As long ago as 1887, it was held by this Court in *Queen-Empress v. Bapuda*, Rat. Un. Cr. C. 350, that while there is nothing to prevent a Magistrate, after he has once discharged an accused under S. 253, from inquiring again into the case against him, as the discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry, the Magistrate is bound to exercise due discretion and to take that discharge into account and avoid oppressive proceedings. In *Reg. v. Devama and Somshekhar*, 1 Bom. 64 at p. 66, it was observed that while a Magistrate has discretion to entertain a fresh complaint against a person who had been discharged by another Magistrate, he should not normally exercise such discretion unless it should appear to him that justice requires him to adopt that course. In *In re Mahadeo Laxman*, 27 Bom. L. R. 352: (A. I. R. (12) 1925 Bom. 258: 26 Cr. L. J. 991), it has been held that the complainant is bound to disclose to the Magistrate before whom he makes a fresh complaint that his previous complaint was dismissed. In *Queen-Empress v. Dolegobind Dass*, 28 Cal. 211: (5 C. W. N. 169), Maclean C. J. at p. 217 expressed the view that no Magistrate ought to rehear a case previously dealt with by another Magistrate of co-ordinate jurisdiction upon the same evidence only, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice. In *Dwarka Nath Mondul v. Beni Madhab Banerji*, 28 Cal. 652 at p. 659: (5 C. W. N. 457 F.B.), Prinsep J. has stated that while according to the decisions of the Calcutta High Court a fresh complaint could be brought against a person who had been discharged, that Court had "thought it proper to restrict the exercise of this power to cases in which fresh evidence was forthcoming." Similar view has been taken by the Madras High Court in *In re Koyassan Kutty*, A. I. R. (5) 1918 Mad. 494: (18 Cr. L. J. 329). In his judgment in that case Sadashiv Aiyar J. observed that while there is nothing in law against the entertainment of a second complaint on the same facts on which a person has already been discharged, inasmuch as a discharge is not equivalent to an acquittal, a person who has been charged once and discharged ought not to be harassed again on the

same charge, unless very strong grounds are shown, e.g. new facts are discovered, which were not within the knowledge of prosecution when the first charge was brought.

[4] In *Biso Ram v. Emperor*, A. I. R. (9) 1922 Pat. 372 : (23 Cr. L. J. 236), the Patna High Court has held that an order of discharge should not be set aside and prosecution started afresh, unless there are new materials before the Magistrate which were not before him previously. The Allahabad High Court is of the same opinion. In *Ramanand v. Sheri*, 56 ALL. 425 : (A. I. R. (21) 1934 ALL. 87 : 35 Cr. L. J. 1062), Iqbal Ahmad J. has observed (p. 426):

"It is clear, therefore, that an order of discharge cannot be a bar to the trial of the person discharged for the same offence of which he was discharged, but it is also equally clear that it would be highly inconvenient to allow successive trials of complaints, based on the same allegations, by different Magistrates and different Courts, after a previous complaint on the same facts by the same complainant and against the same accused has been dismissed by a Magistrate of competent jurisdiction."

[5] The Sind Judicial Commissioner's Court and the Lahore High Court have taken the same view. In *Parsram Bhagwandas v. Emperor*, 30 Cr. L. J. 444 : (115 I. O. 309 (Sind)) and *Emperor v. Alias*, A. I. R. (16) 1929 Sind 242 : (31 Cr. L. J. 687), the Sind Judicial Commissioner's Court held that it is a well-recognised and salutary principle of law that a fresh complaint in respect of the same offence should not be entertained when it is based on same facts and same evidence as were available at the previous trial. In *Mohammad Din v. Mahtab Din*, 33 Cr. L. J. 493 : (137 I. O. 520 (Lah.)) and *Allah Ditta v. Karam Bakhsh*, 12 Lah. 9 : (A. I. R. (17) 1930 Lah. 879 : 31 Cr. L. J. 1180) the Lahore High Court has held that a second complaint should be entertained only in exceptional circumstances, for example where the previous order was passed on incomplete record or was manifestly perverse or foolish. In *Allah Ditta v. Karam Bakhsh*, (12 Lah. 9 : A. I. R. (17) 1930 Lah. 879 : 31 Cr. L. J. 1180), it was urged that in the second case brought against the accused, the complainant was a different person. Referring to this argument, Bhide J. at p. 12 stated :

"But when it is admitted that the facts are identical and there are no good grounds for reconsideration of the case, the mere fact that the complainant is not the same person would, in my opinion, make no difference. If this were not so, it would be easy enough for a complainant to harass an accused person with complaints on the same facts by his friends and relations as often as he likes. It is, in my opinion, nothing short of an abuse of the process of the Court to entertain a fresh complaint in such circumstances."

[6] The same view has been taken by the Rangoon High Court in *Ma The Kin v. Nga E Tha*, 1 U. B. R. 19, *U Shwe v. Ma Sein Bwin*, A. I. R. (12) 1925 Rang. 114 : (26 Cr. L. J.

284) and *Dhana Reddy v. Emperor*, 31 Cr. L. J. 824 : (A. I. R. (17) 1930 Rang. 156). In *U Shwe v. Ma Sein Bwin*, (A. I. R. (12) 1925 Rang. 114 : 26 Cr. L. J. 284), Brown J., observed (p. 114).

"It may, therefore, be taken as settled law in this Province that the Magistrate was competent to take cognizance of the present case; but it does not necessarily follow from the mere fact that he is competent to take cognizance that he should have done so. If an accused person, after enquiry and after an order of discharge has been passed, is liable to further prosecution on the same evidence, as a matter of course, it is quite clear that the way is open to grave injustice and oppression. And although the Magistrate in the present case was competent to take cognizance of a further complaint, it seems to me clear to have been his duty to have considered whether the circumstances were such as to justify him in doing so, or whether he should not have dismissed the complaint under the provisions of S. 203, Criminal P. O.

As pointed out in *Ma The Kin's case*, (1 U. B. R. 19),

"It is the duty of a Magistrate, therefore, who receives a complaint in a case where there has been a previous order of dismissal or discharge, not to issue process, unless he is plainly satisfied that there has been some manifest error or manifest miscarriage of justice, or unless new facts are adduced which the complainant had not knowledge of or could not with reasonable diligence have brought forward in the previous proceedings."

With respect, we agree with these observations of Brown J.

[7] In this case, as I have mentioned, before the present prosecution was commenced, two complaints had been filed on the same facts and for the same offences. The first of these was dismissed on account of the absence of the complainant, and in the second one the accused was discharged after the complainant had adduced all her evidence and after the Magistrate had considered this evidence in order to determine whether it established *prima facie* the guilt of the accused. The complainant has admitted in her deposition that she has no additional evidence to lead beyond that which was already produced by her in the previous case before the First Class Magistrate, Haveli. If she was dissatisfied with the order of discharge in that case, she should have applied to the Sessions Court for revision of that order under S. 436, Criminal P. O. Instead of following that course, she took the unusual step of filing a fresh complaint within 15 days after the order of discharge had been passed. This conduct on her part amounts to taking undue advantage of the process of the Court. This should not have been permitted by the learned Magistrate. In our opinion, the Magistrate exercised his discretion wrongly in issuing process and in deciding to inquire into the case again, after the present complaint had been brought. He should have ascertained from the complainant whether she was in a position to place any new materials before the Court and

should have dismissed the complaint when he found that no additional evidence was forthcoming.

[8] We, therefore, accept the reference made by the Sessions Judge and direct that the proceedings pending before the Third Class Magistrate, Haveli, against the accused should be quashed.

[9] We find from the record that there has been considerable delay in dealing with the revision application made by the accused to the Sessions Court. We hope such delays will be avoided in future.

V.B.B.

Reference accepted.

A. I. R. (36) 1949 Bombay 387 [C. N. 101.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Emperor v. Abdul Majid Abdul Aziz.

Criminal Appeal No. 637 of 1948, Decided on 25th January 1949, against order of Presidency Magistrate, 20th Court, Mazagaon.

Bombay Public Security Measures Act (VI [6] of 1947), S. 2 (1) (b) and (6)—Accused charged with contravention of order under S. 2 (1) (b)—Validity of order challenged—Merely tendering of order by prosecution is not sufficient—Prosecution must call in evidence of Police Commissioner—He must state that he was satisfied that accused was acting in prejudicial manner—In cross-examination accused can challenge order on ground that it was made arbitrarily, capriciously or *mala fide*.

It is not sufficient for the prosecution in a case where it is charging an accused person with contravention of an order made under the Act and where the validity of the order is challenged by the accused merely to tender the order. It would be incumbent on the prosecution to call in evidence the authority that made the order, whether he is the Commissioner of Police or any other police officer authorised to make such an order. The Police Commissioner in tendering the order will have to state that materials were placed before him, that he applied his mind to those materials and that on a careful consideration of those materials he was satisfied that the accused was acting in a prejudicial manner, and having been satisfied he made the order which he was producing. If the evidence of the Commissioner of Police is not effectively challenged by the accused, then on this evidence it would be open to the Court to be satisfied that the order was properly made and the condition precedent laid down by the Legislature was complied with. But it would be open to the accused, in cross-examination of the Commissioner of Police, to challenge the order on the ground that it was made arbitrarily, capriciously or *mala fide*, and the Commissioner of Police would have to repel that charge if such a charge was made in cross-examination. It would also be open to counsel for the accused to suggest to the Commissioner of Police that in making the order he had taken into consideration materials and factors which were foreign or extraneous to the scope and ambit of the Act, or, in other words, that he had permitted his mind to be influenced by considerations which were outside the scope of the statute. If such a suggestion is made and some reasonable grounds are adduced in support of it, it may be that in order to satisfy the Court that he had not taken anything into consideration which was outside the scope and ambit of the Act, it would be necessary for the Police Commissioner to

state the general grounds on which he based his conclusion that the accused was acting in a prejudicial manner. It is perfectly true that it is not incumbent upon the detaining authority to disclose the materials to the Court or to state the sources of information on which he came to a particular conclusion. But there is no legislative bar against the Police Commissioner stating the grounds which led him to be satisfied that the accused was acting in a prejudicial manner, and it may in a particular case become necessary for the Commissioner of Police under cross-examination to disclose to the Court generally what were the grounds which led him to be satisfied and to make a particular order. It would be necessary to disclose these grounds in order to satisfy the Court that his mind was uninfluenced by any foreign or extraneous matter: A. I. R. (25) 1938 Bom. 338 (F.B.), *Foll.* [Para 6]

C. K. Daphtary, Advocate-General and H. M. Choksi, Government Pleader—for the Crown.

K. Joseph, V. H. Kamat and B. M. Kalagate

— for Accused.

Chagla C. J.— This is an appeal against an order of the Presidency Magistrate, 20th Court, acquitting the accused who was charged under S. 2 (6), Bombay Public Security Measures Act (Bom. VI [6] of 1947).

[2] This appeal raises rather an important question of principle. An order was made against the accused on 24th June 1947, by the Commissioner of Police under S. 2 (1) (b) of Bombay Act VI [6] of 1947. The accused complied with the order and left the jurisdiction of the City of Bombay. But he came back to Bombay in November and thereby contravened the order. He was arrested on 22nd November 1947, and he was prosecuted under sub-s. (6) of S. 2 for contravening the order made by the Commissioner of Police. The learned Magistrate took the view that the prosecution had failed to establish the conditions laid down by the Legislature for the making of a valid order under S. 2(1)(b), and, therefore, the accused was entitled to an acquittal. The Advocate-General has contended before us that the judgment of the learned Magistrate is wrong and that the prosecution had established all that was incumbent upon it to establish by merely tendering the order passed by the Commissioner of Police and it was the duty of the Court to accept the order *ex facie* as valid, and, if it was satisfied that the accused had contravened the terms of the order, to proceed to convict the accused and pass the proper sentence.

[3] Now, turning to the Act, it is perfectly true that before an order under sub-cl. (b) can be made, the Provincial Government or an officer to whom the power has been delegated under the Act has to be satisfied that any person was acting, is acting or is likely to act in a manner prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof. The making of a valid order is made conditional by the

Legislature upon the satisfaction of the Provincial Government. It is a condition precedent to the making of the order, and, therefore, before the Court can convict an accused person for contravening an order under S. 6 evidence has got to be led in order to establish that the Provincial Government was satisfied in the manner indicated in sub-s. (1) of S. 2. Section 6 speaks of contravening an order made under this section. It is only a valid order made under the section, the contravention of which constitutes an offence. It is not any order made under the section which requires obedience on the part of the person to whom the order is addressed. It must be an order which satisfies the condition laid down in sub-s. (1) of S. 2, and as we have pointed out the condition which the Legislature requires and which it has imposed upon the executive authority is that it should be satisfied in a particular manner. Now, the Advocate-General has argued that as soon as an order made by the Commissioner of Police is tendered and the order on the face of it says that the Commissioner of Police was satisfied as required by sub-s. (1), nothing further is to be proved by the prosecution, and the condition laid down under sub-s. (1) has been satisfied. In our opinion that is not the correct position in law. Section 6, inasmuch as it provides for a conviction at the hands of a Court, presupposes a judicial determination by the Court. Although the order to be made is an executive order, the determination that it is a valid order is a judicial determination, and for the purpose of a judicial determination all the principles underlying the Evidence Act and all principles underlying criminal jurisprudence must be complied with. And the most fundamental of these principles is that the burden of proving the guilt of the accused is upon the prosecution and the prosecution must establish by evidence all the ingredients which go to constitute an offence, and when an accused person is charged with the contravention of an order, and he pleads not guilty by challenging the validity of the order, one of the most important ingredients to be proved is that the Provincial Government has been satisfied on materials placed before it that the accused is acting in a manner which is prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof, and that ingredient, in our opinion, cannot be said to have been proved merely by the prosecution flourishing in Court an order made by the Police Commissioner. The Advocate-General has given the instance of proceedings under S. 491 where a detained person under the Public Security Measures Act comes to Court complaining of his detention and challenging the order of detention.

The position in proceedings under S. 491 and the position that obtains when a person is charged in a Court of law for the commission of an offence are by no means identical and no analogy can be drawn between the two. In the case of *habeas corpus* proceedings, the petitioner comes to Court on a petition and he has got to make out, and he has got to state, that the order under which he is detained is a bad order on any of the grounds on which it is open to him to attack or assail the order. On that if the Court is satisfied that a *prima facie* case is made out, it calls upon the detaining authority to justify the order and to meet the challenge made to it by the petitioner. In the case of a criminal trial it is the prosecution that initiates the proceedings. It is the prosecution that has got to prove the guilt of the accused, and not merely make out a *prima facie* case. The accused is under no obligation to open his mouth, and the Court can only convict the accused if it is satisfied that the prosecution has established that an offence was committed by the accused. Therefore, it would not be proper for us to accept the suggestion of the Advocate-General and to lay down that as in *habeas corpus* proceedings the Court must in every case be satisfied by the mere production of the order by treating it as *ex facie* valid unless it is challenged on some ground by the accused. To accept this contention would tend to undermine the basic principles of a criminal trial and virtually to throw the burden upon the accused, which burden should and must always lie upon the prosecution.

[4] The learned Presidency Magistrate in coming to the conclusion that he did, relied upon a decision of a Full Bench of this Court reported in *Emperor v. Yarmahomed Ahmedkhan*, 40 Bom. L. R. 483; (A. I. R. (25) 1938 Bom. 338 F. B.). We must say that the view taken by the learned Magistrate of the case before him was not wholly unjustified in view of some of the observations made by Sir John Beaumont C. J., in delivering the judgment of the Full Bench in that case. What the learned Magistrate overlooked, with respect to him, was a rather important distinction between the order which the Full Bench was considering in that case and the order which came up for consideration before him. The Full Bench was considering an order under S. 27, City of Bombay Police Act and that section gave a power to the Police Commissioner to extern certain persons, and that section also enabled the Police Commissioner to act if it appeared to him that a person or persons were acting in a manner which was causing or calculated to cause danger or alarm or reasonable suspicion as to the nature of the activity of of this particular person or persons. The learn-

ed Magistrate seems to have been carried away by the fact that whereas in the Public Security Measures Act it was left to the satisfaction of the Provincial Government whether the person to be externed was acting in a particular manner, similarly under S. 27, City of Bombay Police Act it was left also to the satisfaction of the Commissioner whether a person or a body of persons were acting in a particular manner because in substance there is no difference in the language used in S. 2, Bombay Public Security Measures Act, viz. if the Provincial Government is satisfied, and the language used in S. 27, viz. it shall appear to the Commissioner of Police. But, and that is the fundamental difference, in the case of S. 27, City of Bombay Police Act an objective fact had to be established before the Commissioner of Police could exercise the power given to him under S. 27 and that objective fact was that the person to be externed had to belong to a gang or body of persons in the City of Bombay. Once that objective fact was established, then it was undoubtedly left to the satisfaction of the Commissioner of Police whether he was causing or calculated to cause danger or alarm etc. But in the case of the Bombay Public Security Measures Act there is no objective fact which has to be determined by the Provincial Government or the Commissioner of Police before he is to be satisfied as to the nature of the activity of the person he wants to extern. Bearing in mind this important difference between S. 2 (1), Bombay Public Security Measures Act and S. 27, City of Bombay Police Act we might now consider certain observations made by the learned Chief Justice in that case.

[5] The learned Chief Justice at p. 491 concedes that the very foundation for an order under S. 27, City of Bombay Police Act was the movements or encampment of any gang or body of persons. In other words, unless the objective fact with regard to a gang or body of persons was established the Police Commissioner had no jurisdiction whatever to act under that section. Then at p. 493 the learned Chief Justice lays down two important principles :

"In our opinion, it is a well established principle that where an Act of Parliament confers upon an authority power to make an order in certain conditions, and it is sought to impose a penalty for breach of an order made by the authority, it is incumbent upon the Court hearing the charge to consider whether the order was properly made and to be satisfied on two points : first, that the authority has acted reasonably and not capriciously or oppressively ; and, secondly, that the conditions imposed by the statute have been observed."

With very great respect we entirely agree with these observations and we will indicate presently how these observations have got to be applied

to a case which falls under the Bombay Public Security Measures Act. Then at p. 493 the learned Chief Justice says :

"It is quite true that it is for the Commissioner to be satisfied, and not for the Court. All that the Court can do is to see that there was material before the Commissioner on which he could properly be satisfied "

Now, with very great respect to the learned Chief Justice, if the satisfaction is of the Commissioner or of the Provincial Government, then it is difficult to understand how the Court can judge whether the Commissioner or the Provincial Government is properly satisfied or not. If you import the idea of being properly satisfied, you are immediately substituting your own judgment for that of the Provincial Government or the Police Commissioner, unless the learned Chief Justice used the expression "properly" to mean that in coming to the conclusion the Commissioner of Police had not been influenced by any considerations which was foreign to the purpose or scope of the Act within which he was acting. And we might also point out that this observation would be, with respect, perfectly appropriate to the particular facts which the learned Chief Justice was considering in that case, because, as we have pointed out, if the Police Commissioner had to prove before a Court of law that the objective fact required by S. 27 existed, then certainly the Court would have the right to consider whether the materials on which the Commissioner of Police came to that conclusion were proper materials or not. But in the case before us there is no question of the determination of any objective fact and therefore there is no question of the Court considering the propriety or the adequacy of the materials before the detaining authority on which the decision of the detaining authority was based.

[6] In our opinion therefore it is not sufficient for the prosecution in a case where they are charging an accused person with contravention of an order made under the Public Security Measures Act and where the validity of the order is challenged by the accused merely to tender the order. In the case before the learned Presidency Magistrate, a police officer was called and all that he could say was that he knew that an order had been made by the Police Commissioner. He did not know anything more about it. It would be incumbent on the prosecution to call in evidence the authority that made the order, whether he is the Commissioner of Police, or any other police officer authorised to make such an order. The Police Commissioner in tendering the order will have to state that materials were placed before him, that he applied his mind to those materials and that on a careful consideration of those materials he was satisfied

that the accused was acting in a prejudicial manner, and having been satisfied he made the order which he was producing. If the evidence of the Commissioner of Police is not effectively challenged by the accused, then on this evidence it would be open to the Court to be satisfied that the order was properly made and the condition precedent laid down by the Legislature was complied with. But it would be open to the accused, in cross-examination of the Commissioner of Police, to challenge the order on the ground that it was made arbitrarily, capriciously or *mala fide*, and the Commissioner of Police would have to repel that charge if such a charge was made in cross-examination. It would also be open to counsel for the accused to suggest to the Commissioner of Police that in making the order he had taken into consideration materials and factors which were foreign or extraneous to the scope and ambit of the Public Security Measures Act, or, in other words, that he had permitted his mind to be influenced by considerations which were outside the scope of the statute. If such a suggestion is made and some reasonable grounds are adduced in support of it, it may be that in order to satisfy the Court that he had not taken anything into consideration which was outside the scope and ambit of the Act, it would be necessary for the Police Commissioner to state the general nature of the grounds on which he based his conclusion that the accused was acting in a prejudicial manner. It is perfectly true that it is not incumbent upon the detaining authority to disclose the materials to the Court or to state the sources of information on which he came to a particular conclusion. But there is no legislative bar against the Police Commissioner stating the grounds which led him to be satisfied that the accused was acting in a prejudicial manner, and as we have said before it may in a particular case become necessary for the Commissioner of Police under cross-examination to disclose to the Court generally what were the grounds which led him to be satisfied and to make a particular order. It would be necessary to disclose these grounds in order to satisfy the Court that his mind was uninfluenced by any foreign or extraneous matter.

[7] Turning now to the appeal before us, though the accused sought to challenge the order on several grounds, the Police Commissioner never entered the witness-box, nor was any other evidence called to satisfy the Court that there were materials before the Police Commissioner which he considered before he was satisfied that the accused was acting in a prejudicial manner and before he made order of externment. Therefore, without agreeing with the learned Magistrate in all the views that he has expressed

in his judgment, we must uphold his decision on the narrow and specific ground that as the detaining authority did not step into the witness-box in order to establish the validity of the order and to refute the objections of the accused against its validity by satisfying the Court that the condition precedent was complied with, the prosecution has failed to prove the offence with which the accused was charged.

[8] The result therefore is that the appeal must fail. It is accordingly dismissed.

V.R.B.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 390 [C. N. 102.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Vishwanath Mahadev Adhikari—Applicant
v. Krishnaji Ramchandra Bodas—Opponent.

Civil Revn. Appln. No. 639 of 1948, Decided on 20th June 1949, from decision of Civil Judge (Senior Division), Ratnagiri, in Civil Appeal No. 25 of 1947.

Bombay Agricultural Debtors' Relief Act (XXVIII [28] of 1947), S. 56, Proviso 2 — Proviso is retrospective—Pending appeal must be decided in accordance with new Act.

The language used in the second proviso to S. 56 is fairly clear and explicit and makes this proviso retrospective in its effect. What the Legislature says is that the appeals shall be continued and disposed of as if they were appeals under this Act, which clearly means that all the provisions of this Act shall apply to the appeals which are pending. The appeal Court is asked to treat the appeals as if the new Act was in force and not the old Act, and in disposing of those appeals the appeal Court has to consider the substantive law as well as the procedural law brought into force by Act XXVIII [28] of 1947. Therefore, the appeal Court set up by Act XXVIII [28] of 1947, must dispose of the appeals pending before it in accordance with the provisions of law laid down in the new Act, and not according to the provisions of law as contained in Bombay Act XXVIII [28] of 1939. [Para 3]

G. R. Madbhavi—for Applicant.

M. G. Chitale—for Opponent.

Chagla C. J. — A very short point arises for determination in these civil revision applications. Certain applications were filed for adjustment of debts under the Bombay Agricultural Debtors' Relief Act (Bombay XXVIII [28] of 1939), and from the decisions of these applications appeals were preferred as contemplated by that Act. While the appeals were pending, Act XXVIII [28] of 1939 was repealed and Act XXVIII [28] of 1947 was enacted, and the question that we have to consider and decide is whether the appeals should be disposed of according to the provisions of law contained in Act XXVIII [28] of 1947 or according to the provisions of law as contained in Act XXVIII [28] of 1939.

[2] Now, the material provision which helps us to decide this question as contained in Act XXVIII [28] of 1947 is S. 56 and in that section

there are three provisos to which a reference might be made. Proviso 1 is:

"Provided that all proceedings pending before any such Board shall be continued before the Court as if an application under S. 4 of this Act had been made to the Court."

Proviso 2 is:

"Provided further that all appeals pending before any Court under the repealed Act shall be continued and disposed of as if they were appeals under this Act."

And proviso 3 is:

"Provided also that all appeals against decisions, orders or awards of any Board established under the repealed Act which but for this Act would have lain shall when presented be deemed to be appeals from the decisions, orders, or awards passed by a Court under this Act and shall be disposed of accordingly."

[3] Now it cannot be disputed, and Mr. Chitale for the opponent has not disputed, that proviso 1 gives retrospective effect to the provisions of Act XXVIII [28] of 1947 as far as pending applications are concerned. Therefore, although an application was filed when the old Act was in force, by virtue of the passing of the new Act the provisions of the new Act would apply to the application pending under S. 4. It is also difficult to dispute that with regard to proviso 3, in cases where appeals have not been preferred, the proviso lays down that appeals shall be presented as if they were appeals from the decisions, orders or awards passed by a Court under this Act and shall be disposed of accordingly, and therefore this proviso also gives retrospective effect to the provisions of this Act with regard to those appeals which have not yet been preferred because the appeals are to be deemed to have been from decisions passed by a Court under the new Act and therefore a Court under the new Act would necessarily apply the new law as enacted by Act XXVIII [28] of 1947. But, says Mr. Chitale, that as far as proviso 2 is concerned, appeals which were pending should be disposed of according to the old law and not according to the new law, and Mr. Chitale's contention is that the Legislature has not chosen to give retrospective effect to this particular provision with regard to pending appeals. Mr. Chitale says that proviso 2 only deals with the procedural aspect of appeals and not with regard to the substantive law that has got to be applied to appeals which were pending when the new Act was passed. Therefore, according to Mr. Chitale if the Boards from which the appeals are preferred decide the applications correctly according to the law then obtaining, the appeal Court under the new Act could not interfere with those decisions if those decisions were not in conformity with the new law which came into force by Act XXVIII [28] of 1947. Now, if Mr. Chitale's contention was correct, it is difficult to understand why proviso 2 was enacted at all,

because it is a well established canon of all procedural legislation that it applies to all pending proceedings at the date when it comes into force. Therefore, even if this proviso did not find a place in the statute, pending appeals would be governed by the procedure laid down by the new Act at the date when the appeals came to be heard by the Court of appeal, and therefore we cannot accept Mr. Chitale's contention that the only intention of the Legislature in enacting this proviso was to lay down that procedurally the Court of appeal shall dispose of the appeal according to the procedure laid down by Act XXVIII [28] of 1947. Further, in our opinion, the language used in proviso 2 is fairly clear and explicit and makes this proviso retrospective in its effect. What the Legislature says is that the appeals shall be continued and disposed of as if they were appeals under this Act, which clearly means that all the provisions of this Act shall apply to the appeals which are pending. The appeal Court is asked to treat the appeals as if the new Act was in force and not the old Act, and in disposing of those appeals the appeal Court has to consider the substantive law as well as the procedural law brought into force by Act XXVIII [28] of 1947. Therefore, in our opinion, the appeal Court set up by Act XXVIII [28] of 1947 must dispose of the appeals pending before it in accordance with the provisions of law laid down in the new Act. The learned Judge below took the contrary view.

[4] We would, therefore, set aside the order of the lower Court and send these appeals back to the District Court with instructions that they should be disposed of in accordance with the law contained in Act XXVIII [28] of 1947. No order as to costs here. Costs before the District Court costs in the appeal.

V.B.B.

Order set aside.

A. I. R. (36) 1949 Bombay 391 [C. N. 103.]

WESTON AND CHAINANI JJ.

Harisingji Chandrasingji — Plaintiff — Appellant v. Ajitsingji Chandrasingji — Defendant — Respondent.

First Appeal No. 145 of 1945, Decided on 14th January 1949, from decision of Civil Judge, Senior Division, Broach, in Special Jurisdiction Suit No. 2 of 1943.

(a) Hindu law — Maintenance — Illegitimate son — Parties belonging to regenerate class — Maintenance is awarded in lieu of right of inheritance — Impartible property — No right of inheritance even to legitimate son — Illegitimate son cannot claim maintenance as of right except on basis of custom — Hindu law — Impartible estate — Maintenance.

Amongst the regenerate classes an illegitimate son is not a coparcener or a co-owner of the joint family estate. He is entitled to maintenance only, but this is awarded to him in lieu of inheritance and in recognition of his status as a son. If the property, though it

may be ancestral or joint family property, is impartible, even a legitimate son cannot, during the lifetime of his father, claim any interest or rights in it, apart from the right to maintenance given to him by custom, which has been judicially recognised. He is not a cosharer with his father and the income from the estate is the absolute property of his father. He cannot ask for partition or separate possession of a share of the estate. If he is the eldest son, he possesses the right to succeed to the estate by survivorship. This right can also be defeated by the father by alienating the property. The other legitimate sons do not enjoy even this right, unless the eldest son dies without male issue. They are not entitled to any share in the estate or its income. An illegitimate son is not in and cannot be given any higher position. He is awarded maintenance by reason of his being disqualified from receiving a share in the inheritance, which he would have been entitled to get if he had been legitimate. In lieu of exclusion from inheritance, he is entitled to receive maintenance as long as he lives and not only until he attains majority. It has been contended that this right continues even when the estate is impartible, as it is not inconsistent with impartibility. But the right is founded on the consideration that an illegitimate son is deprived of the right to inheritance enjoyed by a legitimate son. In impartible property all legitimate sons are not entitled to inheritance. Consequently, the basis of the claim of an illegitimate son to maintenance goes. But just as impartibility is the creature of custom, so custom may confer upon an illegitimate son a right to maintenance, as it has conferred upon a legitimate son. In the absence of such custom, he is not entitled to maintenance as of right: *Case law discussed.* [Para 15]

(b) Hindu law.—Impartible estate—Maintenance—Holder of estate has full powers of dealing with it—No person whom holder is not personally bound to maintain can claim maintenance from estate except on basis of custom.

It is now settled that in the absence of a custom restricting his power of alienation, the holder of an impartible estate has full power to deal with and enjoy it as if it were his separate property. He may transfer or alienate it by gift, will or otherwise, even though it may be ancestral property. The income from the property belongs exclusively to him. No person, who is not one of those whom the holder is personally bound to maintain, can therefore claim maintenance from the estate as of right; for such a right would be inconsistent with the right of the holder to alienate. Custom may, however, restrict the holder's power of alienation by making it subject to the right of certain members of the family to receive maintenance from the estate. An illegitimate son cannot therefore claim maintenance from an impartible estate unless the right to it is given to him, by custom: A.I.R. (10) 1923 P. C. 59, *Ref.*

[Para 16]

R. J. Thakor and N. C. Shah — for Appellant.

S. M. Shah with V. T. Gambhirvalla, K. V. Patel and T. R. Desai — for Respondent.

Chainani J. — The appellants in these two appeals are illegitimate sons of Sardar Chandrasinghji Himatsinghji, who was the Thakore of Matar estate, which is a talukdari estate in Amod taluka in Broach District. He was a Rajput by caste. The respondent is the eldest legitimate son of Sardar Chandrasinghji, and succeeded to the estate on the latter's death on 10th July 1939. By custom the estate is impartible, and succession to it is governed by the rule

of primogeniture. In 1943 the two appellants filed two separate suits claiming maintenance from the respondent. They stated in their plaints that their mother was in the continuous and exclusive keeping of Chandrasinghji, that there was a custom prevalent in Gujarat and in the Broach District according to which the junior members of the family and illegitimate sons were entitled to maintenance, and that they had, therefore, a right to recover maintenance from the estate, both according to custom and also according to law. The defendant disputed these statements. The trial Judge found that the mother of the appellants-plaintiffs was in the continuous and exclusive keeping of Chandrasinghji, and that apart from the talukdari estate, Chandrasinghji had left no separate property of his own. He also held that the appellants had not proved the custom as regards the right of illegitimate sons to claim maintenance from the estate. These findings have not been disputed in appeal. The trial Judge also came to the conclusion that as the estate was impartible, and as no custom giving a right to illegitimate sons to receive maintenance from it had been proved, the plaintiffs were not entitled to any relief. He, therefore, dismissed their suits. The plaintiffs have appealed.

[2] The position of an illegitimate son rests upon two texts, as pointed out at p. 646 in Mayne's treatise on Hindu Law and Usage, 1938 Edition. According to Manu,

"A son begotten by a man of the servile class on his female slave, or on the female slave of his male slave, may take a share of the heritage, if permitted (by the other sons)"

Yajnavalkya has enlarged the rule as follows:

"Even a son begotten by a Sudra on a female slave (*dasiputra*) may take a share by the father's choice. But, if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brothers may inherit the whole property in default of daughter's sons."

This is cited as the first verse in Mitakshara, c. I, S. 12. In explanation of these texts, Vijnanesvara says in the second verse,

"The son, begotten by a Sudra on a female slave, obtains a share by the father's choice, or at his pleasure. But, after (the demise of) the father, if there be sons of a wedded wife, let these brothers allow the son of the female slave to participate for half a share: that is let them give him half (as much as is the amount of one brother's) allotment. However, should there be no sons of a wedded wife, the son of the female slave takes the whole estate, provided there be no daughters of a wife, nor sons of daughters. But, if there be such, the son of a female slave participates for half a share only."

The third verse in S. 12 of the Mitakshara is as follows:

"From the mention of a Sudra in this place (it follows that) the son begotten by a man of a regenerate tribe on a female slave does not obtain a share even by the father's choice. But, if he be docile, he receives a simple maintenance."

The last verse is obviously based on the conclusion drawn by the learned author from the position assigned to an illegitimate son of a Sudra by the texts. Mitra Misra in the *Vira-mitrodaya* (C. II, Pt. II, S. 23, Shastri's translation, Ed. Calcutta 1879, p. 130) has interpreted the texts thus :

"From the use of the term 'a person of the servile class' in Yajnavalkya's text, it appears that one begotten by a twice born person on a female slave cannot, notwithstanding the desires of the father, get a share or a half-share after his death; the taking of his entire property is out of the question : but he is entitled only to maintenance, provided he be not disobedient."

[3] The texts refer in terms only to dasiputra or the son of a female slave. But this restriction is now obsolete with regard to the right of maintenance given to an illegitimate son. In *Muttusawmy Jagavera Yettappa Naicker v. Venkateswara Yettaya*, 12 M. I. A. 203; (2 Beng. L. R. P. C. 15), the Privy Council allowed maintenance to a son who was the result of a casual intercourse, while in *Rahi v. Govind Valad Teja*, 1 Bom. 97, the Bombay High Court, and in *Viraramuthi Udayan v. Singaravelu*, 1 Mad. 306, *Kuppa v. Singaravelu*, 8 Mad. 325 and *Subramania Mudaly v. Velu*, 34 Mad. 68; (5 I. C. 919), the Madras High Court allowed it in the case of an adulterous intercourse. In *Muttusawmy Jagavera Yettappa Naicker v. Venkateswara Yettaya*, (12 M. I. A. 203), at p. 220 the Privy Council has observed :

"It appears, however, to their Lordships, that if it be established that the respondent was the natural son of this Hindoo father, and recognised by him as such, it is not essential to his title to maintenance that he should be shown to have been born in the house of his father, or of a concubine possessing a peculiar status therein."

In *Roshan Singh v. Balwant Singh*, 27 I. A. 51; (22 ALL. 191 P. C.), their Lordships, after referring to the third verse of S. 12 of the Mitakshara, which deals with the rights of an illegitimate son of a father belonging to the higher castes, stated (p. 56) :

"There is no reason to think that this effect of illegitimacy differed according to the particular mode of it."

[4] A Hindu father is under a personal obligation to maintain his minor sons, irrespective of whether he has property or not. This is based on the following precept of Manu :

"Aged parents, virtuous wife and an infant child must be maintained even by doing hundred misdeeds."

There is, however, no such obligation in regard to adult sons. It has, therefore, been held that a father is not bound to maintain an adult son out of the property which belongs exclusively to him: see *Premchand Peparah v. Hulashchand Peparah*, 4 Beng. L. R. (App.) 23; (12 W. R. 494), *Nilmoney Singh Deo v. Baneshur*, 4 Cal. 91; *Bhoopati Nath Chakrabarti v. Basanta Kumaree Debee*, 63 Cal. 1098 at p. 1111; (A. I. R.

(23) 1936 Cal. 556; *Ammakannu v. Appu*, 11 Mad. 91 and *Subbayya Thevar v. Marudappa Pandian*, I. L. R. (1937) Mad. 42; (A. I. R. (23) 1936 Mad. 828). As regards illegitimate sons, Venkatramana Rao J., in *Muniappa Mudaliar v. Kuppuswami Mudaliar*, A. I. R. (29) 1942 Mad. 419 (2); (202 I. C. 124), stated (p. 420) :

"It is a well settled principle of Hindu law that where the father is not possessed of any joint family property, he is under no personal obligation to maintain his legitimate son and the latter has no claim over the separate property of his father : vide *Ammakannu v. Appu*, 11 Mad. 91. An illegitimate son cannot claim higher rights than the legitimate son and the same principle ought to apply to him."

This decision was followed in *Krishna Rao v. Venkataramarao*, A. I. R. (31) 1944 Mad. 362; (1944-1 M. L. J. 219), in which it was held that an adult illegitimate son was entitled to maintenance both before and after his father's death, if the father was in possession of any joint family property.

[5] It had been held in various cases decided by the Madras High Court that the texts cited above refer to the estate of a separated house holder, that is, to the separate property of father (see *Ranoji v. Kandoji*, 8 Mad. 557; *Parvathi v. Thirumalai*, 10 Mad. 334; *Ramalinga Muppan v. Pavadai Goundan*, 25 Mad. 519; (11 M. L. J. 399) and *Gopalasami Chetti v. Arunachelam Chetti*, (27 Mad. 32).) After referring to these cases, Sir Dinshah Mulla in his judgment in *Vellaiyappa Chetty v. Natarajan*, 58 I. A. 402 at p. 407; (A. I. R. (18) 1931 P. C. 294) has stated that verses 1 and 2, in C. I, S. 12 of the Mitakshara, which relate to a Sudra son make no mention of maintenance where the father has left no property to which the son can succeed, and that cases in which the maintenance is claimed out of joint family property must, therefore, be considered outside the text. Following these decisions Broomfield J. in *Hiralal Laxmandas v. Meghraj Bhickchand*, I. L. R. (1938) Bom. 779 at p. 789; (A. I. R. (25) 1938 Bom. 433), has stated that it is now settled law that the texts apply only in the case of separate property of the father. Nevertheless maintenance to illegitimate sons out of joint family property in the hands of the surviving members of the joint family has been awarded in several cases : see *Hargobind Kuari v. Dharam Singh*, 6 ALL. 329; (1884 A. W. N. 100); *Ananthaya v. Vishnu*, 17 Mad. 160; *Gopalasami Chetti v. Arunachelam, Chetti*, 27 Mad. 32; *Subramania Mudaly v. Valu*, 34 Mad. 68; *Vellaiyappa Chetty v. Natarajan*, 50 Mad. 340; (A. I. R. (14) 1927 Mad. 386); *Vellaiyappa Chetty v. Natarajan*, 58 I. A. 402; (A. I. R. (18) 1931 P. C. 294), and *Hiralal Laxmandas v. Meghraj Bhickchand*; (I. L. R. (1938) Bom. 779; A. I. R. (25) 1938 Bom. 433). Maintenance

out of joint family property has been awarded on the recognised principle of Hindu law that where a person is excluded from inheritance to property or from a share on partition of joint family property, he is entitled to maintenance out of that property (see *Vellaiyappa Chetty v. Natarajan* : (58 I. A. 402), at p. 407). In *Vellaiyappa Chetty v. Natarajan*, 50 Mad. 340: (A.I.R. (14) 1927 Mad. 386), Krishnan J. has summed up the position thus (p. 346) :

" the authorities are quite clear that when the illegitimate son cannot ask for a share, he is entitled to get maintenance from his putative father's joint family state even in the hands of his coparceners."

The decision in this case was affirmed by the Privy Council in *Vellaiyappa Chetty v. Natarajan*, 58 I. A. 402: (A. I. R. (18) 1931 P. C. 294).

[6] So far as Sudras are concerned, the law as settled by the Privy Council in *Raja Jogen-dra Bhupati Hurri Chundun Mahapatra v. Nityanund Mansingh*, 17 I. A. 128 (18 Cal. 157, P. C.); *Kamulammal v. Visvanathaswami Naicker*, 50 I. A. 32 : (A. I. R. (10) 1923 P. C. 8), and *Vellaiyappa Chetty v. Natarajan*, 58 I. A. 402 : (A. I. R. (18) 1931 P. C. 294), is that an illegitimate son does not acquire at his birth any right to a share in the estate in the same way as a legitimate son would do, that during his father's lifetime he can take a share only by father's choice, that he cannot enforce a partition, that on the father's death he succeeds to the father's estate as a coparcener with the legitimate son, that the share of inheritance given to him is not merely in lieu of maintenance, but in recognition of his status as a son, and that the share to which he is entitled is a half of that which he would have taken had he been legitimate. As regards illegitimate sons of Hindus belonging to the three higher classes, they are entitled to maintenance and not to any share of the inheritance : see *Chuoturya Run Murdun Syn v. Purhulad Syn*, 7 M. I. A. 18 : (4 W. R. 132 P. C.) ; *Raja Parichat v. Zalim Singh*, 4 I. A. 159 : (3 Cal. 214 P. C.) and *Roshan Singh v. Balwant Singh*, 27 I. A. 51 : (22 ALL. 191 P. C.). In *Hargobind Kuari v. Dharam Singh*, 6 ALL. 329 : (1884 A. W. N. 100), in accordance with the last sentence in the third verse in S. 12 of the Mitakshara, it was held that an illegitimate son was entitled to maintenance so long as he was 'docile', that is 'not disobedient' to the head of the family. The following passage from the Viramitrodaya of Mitra Misra was cited at p. 335 :

"Obedience to the head of the family, not the age of the illegitimate descendant, or his capacity to earn his own livelihood, is the test by which under Hindu law, the continuance of the right to receive maintenance must be decided. Till the illegitimate sons reach full age, this test cannot be applied ; but thereafter it cannot be ignored."

Cowell in his Tagore Law Lectures 1870, vol. I, at p. 172 states :

"But in the three superior castes, an illegitimate son has long ceased to possess a right to inherit. Nevertheless, he is not, as in English law, *quasi nullius filius*, but his *status* as a son in the family, and his rights to maintenance, are secured to him."

In *Ananthaya v. Vishnu*, 17 Mad. 160, the Madras High Court held that the maintenance given to an illegitimate son amongst regenerate classes is in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance. As stated in the judgment in that case (p. 161) :

"An illegitimate son is one of that class of persons who, by reason of their exclusion from inheritance, are allowed maintenance by the Hindu law, and this is clear from the facts that among Sudras he shares in his father's property together with the legitimate son . . . The Smriti of Yajnyavalkya awards maintenance to an illegitimate son not as a provision against starvation and vagrancy, but in recognition of his status as a member of his father's family and by reason of his exclusion from inheritance among the regenerate classes. As in the case of females of the family or of disqualified heirs, an illegitimate son is entitled to maintenance as long as he lives"

As the maintenance awarded is the result of exclusion from inheritance, and as the Hindu theory is that family property constitutes assets from which charges in the nature of maintenance, etc., are to be met, the maintenance decreed to an illegitimate son may be secured on the family property."

This decision was followed in *Subramania Mudaly v. Valu*, 34 Mad. 68 : (5 I. C. 919). In *Raoji Rupa v. Kunjalal Hiralal*, 54 Bom. 455: (A. I. R. (17) 1930 P. C. 163) in which the right of illegitimate sons to maintenance was disputed, the Privy Council at p. 458 has observed :

"They (the lower Courts) also held that as *dasiputras* the sons were entitled to maintenance during their lives out of Bolmukund's estate, and their Lordships have no doubt on the authorities that this is correct."

Ananthaya v. Vishnu : (17 Mad 160) was referred to and discussed in *Vellaiyappa Chetty v. Natarajan*, 58 I. A. 402 : (A. I. R. (18) 1931 P. C. 294) in which, after reviewing the various decided cases, Sir Dinshah Mulla stated at p. 410 :

"That maintenance in the case of twice born classes is in lieu of inheritance is apparent from the terms of verse 3."

[7] The question was again considered in *Hiralal Laxmandas v. Meghraj Bhikchand*, (I. L. R. (1938) Bom. 779 : A. I. R. (25) 1938 Bom. 433) in which it was held that where a father has left no separate property, an illegitimate son is entitled to maintenance from the joint family property in the hands of surviving members of the family. In that case it was contended that the decision in *Ananthaya v. Vishnu*. (17 Mad. 160) was not good law. This decision was, therefore, considered and discussed at length in the judgments of both Macklin and Broomfield JJ., who decided *Hiralal Laxmandas v. Meghraj Bhikchand*, (I. L. R. (1938)

Bom. 779 : A.I.R. (25) 1938 Bom. 433). In his judgment Macklin J., has stated at pp. 785-786 :

"Moreover one of the main grounds of the decision in *Vellaiyappa's case* : 58 I.A. 402 : A. I. R. (18) 1931 P. C. 294) was the status of the illegitimate son of a Shudra as a member of his father's family, and one of the principal reasons for holding (as against some of the earlier authorities) that he was recognised as a member of his father's family was that he was mentioned in Chapter I of the Mitakshara (dealing with sons who are entitled to unobstructed inheritance) and immediately before Chapter II of the Mitakshara, which deals with persons entitled to an obstructed inheritance. It is difficult not to apply the same reasoning to the status of an illegitimate son in the regenerate classes.

In giving his reasons for saying that the regenerate illegitimate son unlike the Shudra does not obtain an actual share even by the father's choice, or the whole estate after the father's death, the author does not say that this is because the regenerate stands upon a different footing from the Shudra. What he does say is that the regenerate son is not mentioned along with the Shudra as a person entitled to the actual estate and therefore it must follow that he does not get the actual estate, and in fact all that he gets is maintenance. I can see nothing in this that suggests any withholding from the regenerate illegitimate son of any recognition of his status as a son and member of the family; on the contrary it seems to me that he is treated in that respect as being upon the same footing as the Shudra."

At page 787, he stated :

"I think therefore that the decision in *Ananthaya v. Vishnu* : (17 Mad. 160) ought to be accepted as correct and should be followed in this case."

Broomfield J. took the same view, and in his judgment at pp. 792 to 793 stated :

"The illegitimate son of a Shudra gets his share because he is a member of the family and if he cannot get a share because there is no separate estate, he gets maintenance in lieu of inheritance. But there is nothing in the judgment as far as I can see which necessarily points to the conclusion that the illegitimate son of a Shudra is the only one who can be regarded as a member of the family. The view that maintenance in twice-born classes is in lieu of inheritance is in fact accepted

The argument for the appellant is that the principle does not apply because an illegitimate son in the regenerate classes cannot be said to be excluded from inheritance having never been in the category of possible heirs. It is true that as compared with the case of a son of a Shudra the principle has to be applied at an earlier stage. The latter according to the text gets a share of the inheritance if there is any separate estate. If there is none he may be said to be excluded from inheritance and therefore is entitled to maintenance out of the joint family estate. The illegitimate son in the twice born classes is given maintenance originally by the text itself. But as that text has been interpreted to mean that he gets maintenance in lieu of inheritance, and that seems to connote exclusion from inheritance of a member of the family who would have inherited but for the disqualification arising from the circumstances of his birth, I can see no convincing reason why the principle should not be applied in this case also. I think we want stronger grounds than have been shown to exist at present before we differ from the law as it has been laid down by the High Court of Madras for more than forty years."

[8] It is clear from the authorities cited above that amongst the twice-born classes an illegitimate son is awarded maintenance for life out of joint family property in lieu of inheritance and in recognition of his status as a son and a member of his father's family. The question for consideration now is to what extent or in what respect this right of an illegitimate son is affected owing to property being impartible property, succession to which is regulated by primogeniture. There is no direct authority on this point, and in the latest decision of the Privy Council reported in *Bhima Deo v. Chakrapani*, A. I. R. (32) 1945 P. C. 102: (I. L. R. (1945) KAR. P. C. 266) the Privy Council has left the question open. Questions relating to impartible estates have been the subject of consideration by the Privy Council in various cases: see *Rani Sartaj Kuari v. Rani Deoraj Kuari*, 15 I. A. 51: (10 ALL. 272 P. C.), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards and Venkat Kumari Mahipati Surya Rao*, 26 I. A. 83 : (22 Mad. 383 P. C.) *Raja Yarlagadda Mallikarjuna Prasada Nayudu v. Raja Yarlagadda Durga Prasada Nayudu*, 27 I. A. 151: (24 Mad. 147 P. C.), *Rama Rao v. Raja of Pittapur*, 45 I. A. 148: (A. I. R. (5) 1918 P. C. 81), *Bajinath Prashad Singh v. Tej Bali Singh*, 48 I. A. 195: (A. I. R. (8) 1921 P. C. 62), *Jagadamba Kumari v. Narain Singh*, 50 I. A. 1: (A. I. R. (10) 1923 P. C. 59), *Protap Chandra Deo v. Jagdish Chandra Deo*, 54 I. A. 289: (A. I. R. (14) 1927 P. C. 159), *Shiba Prasad Singh v. Prayag Kumari Debi*, 59 I. A. 331: (A. I. R. (19) 1932 P. C. 216), *Collector of Gorakhpur v. Ram Sundar Mal*, 61 I. A. 286: (A. I. R. (21) 1934 P. C. 157), *Anant Bhikappa Patil v. Shankar Ramchandra Patil*, 46 Bom. L. R. 1: (A. I. R. (30) 1943 P. C. 196), *Commissioner of Income-tax v. Dewan Bahadur Dewan Krishna Kishore*, 68 I. A. 155: (A. I. R. (28) 1941 P. C. 120) and *Raja Velugoti Sarvagana Kumara Krishna Yachendra Bahadur Varu v. Raja Rajeswara Rao*, 68 I. A. 181: (A. I. R. (29) 1942 P. C. 3). The position as settled by these cases appears to be as stated in the following paragraphs.

[9] It has been held that property does not cease to be joint family property merely because it is impartible: see *Bajinath Prashad Singh v. Tej Bali Singh* 48 I. A. 195: (A. I. R. (8) 1921 P. C. 62), *Anant Bhikappa Patil v. Shankar Ramchandra Patil*, (46 Bom. L. R. 1: A. I. R. (30) 1943 P. C. 196) and *Commissioner of Income-tax v. Dewan Bahadur Diwan Krishna Kishore*, (68 I. A. 155: A. I. R. (28) 1941 P. C. 120). The only characteristic of joint family property which it retains is that

the members of the family possess the right to take property by survivorship and the estate devolves

"upon that person who in fact and in law being joint in respect of the estate is also the senior member in the senior line"; see *Shiba Prasad Singh v. Prayag Kumari Debi*, (59 I. A. 331: A. I. R. (19) 1932 P. C. 216.)

In his judgment in this case at p. 345, Sir Dinshah Mulla has summarized the position in the following terms:

"In the case of ordinary joint family property the members of the family have: (1) the right of partition; (2) the right to restrain alienations by the head of the family except for necessity; (3) the right of maintenance; and (4) the right of survivorship. The first of these rights cannot exist in the case of an impartible estate, though ancestral, from the very nature of the estate. The second is incompatible with the custom of impartibility as laid down in *Sartaj Kuari's case*: (15 I. A. 51: 10 All 272 P. C.) and the first *Pittapur Case*; and so also the third, as held in the second *Pittapur Case*. To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate, though ancestral, is clothed with the incidents of self-acquired and separate property. But the right of survivorship is not inconsistent with the custom of impartibility. This right, therefore, still remains."

[10] It is also settled that the holder for the time being of the impartible estate has complete right of disposition over the property and can transfer it absolutely, by gift, will or otherwise unless this right is restricted by custom or the nature of the tenure of the estate; see *Rani Sartaj Kuari v. Rani Deoraj Kuari*, 15 I. A. 51: (10 ALL. 272 P. C.), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. Court of Wards and Venkata Kumari Mahipati Surya Rao*, 26 I. A. 183: (22 Mad. 383 P. C.), *Rama Rao v. Raja of Pittapur*, 45 I. A. 148: (A. I. R. (5) 1918 P. C. 81), and *Protap Chandra Deo v. Jagadish Chandra Deo*, 54 I. A. 289: (A. I. R. (14) 1927 P. C. 159). The reasons for this view, as given in *Sartaj Kuari's case*: (15 I. A. 51), at p. 63, are:

"In *Baboo Beer Pertab Sahee v. Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1: (9 W. R. 15 P. C.), . . . their Lordships held that the foundation of the supposed restriction on the power of the father to make a will was the community of interest which the members of the family acquired by birth. . . .

The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons. Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation, since the estate is in common."

In *Rama Rao v. Raja of Pittapur*, (45 I. A. 148: A. I. R. (5) 1918 P. C. 81), their Lordships stated at p. 153:

"It (*Sartaj Kuari's case*, (15 I. A. 51: 10 All. 272 P. C.)) settled that in an impartible Zamindari there is no coparcenary, and consequently no person existed who as coparcener could object to alienation of the whole subject by the *de facto* and *de jure* holder."

In referring to *Sartaj Kuari's case*: (15 I. A. 51: 10 ALL. 272 P. C.), Lord Dunedin in *Bajinath Prashad Singh v. Tej Bali Singh*, 48 I. A. 195: (A. I. R. (8) 1921 P. C. 62), observed (p. 212):

"No doubt it would have been possible to decide *Sartaj Kuari's case*: (15 I. A. 51: 10 All. 272 P. C.), differently if the theory had been accepted that impartibility, being a creature of custom, though incompatible with the right of partition, yet left the general law of the inalienability by the head of the family for other than necessary causes without the consent of the other members as it was. This is recognised by Sir. R. Couch when in delivering the judgment of the Board, he says: 'The question of how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom, is one of some difficulty.' Even, however, if their Lordships thought the decision in *Sartaj Kuari's case*: (15 I. A. 51: 10 All. 272 P. C.), wrong — an opinion which they do not pronounce — the case has stood too long to be now touched."

The two cases *Rani Sartaj Kuari v. Rani Deoraj Kuari*: (15 I. A. 51: 10 ALL. 272 P. C.), and *Rao Venkata v. Court of Wards*, (26 I. A. 83: 22 Mad. 383 P. C.), were again reviewed by the Privy Council in *Protap Chandra Deo v. Jagadish Chandra Deo*, (54 I. A. 289: A. I. R. (14) 1927 P. C. 159), and at p. 297 their Lordships stated that:

"no ground had been established for a refusal on their part to follow the decisions in those two cases."

[11] It has also been held that the income of the impartible estate belongs absolutely to the holder of the estate for the time being and is not the income of the undivided family, and that the holder does not receive it as manager on behalf of himself and the members of the family; see *Jagadamba Kumari v. Narain Singh*, 50 I. A. 1: (A. I. R. (10) 1923 P. C. 59), and *Commissioner of Income-tax v. Dewan Bahadur Dewan Krishna Kishore* 68 I. A. 155: (A. I. R. (28) 1941 P. C. 120). In the words of Lord Buckmaster in *Jagadamba Kumari's case*, (50 I. A. 1) at p. 7:

"The income when received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely dissociated from the ownership of the raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character."

The same view was taken in *Commissioner of Income-tax v. Dewan Bahadur Dewan Krishna Kishore*: (68 I. A. 155: A. I. R. (28) 1941 P. C. 120), in which their Lordships have stated (p. 179):

"It is not true in fact or in law to say that the income from the estate is received by the assessee as the income of a joint Hindu family receivable by the karta, nor is it received by him on behalf of himself and his sons; but on his own account as the holder by single heir succession of the impartible estate. The 'presently existing right' of the sons is to be paid a suitable main-

tenance, or to have it provided for them in the ordinary course of Hindu family life. The Hindu law is familiar not only with persons such as wives, unmarried daughters and minor children, for whose maintenance a Hindu has a personal liability whether he have any property or none, but also with cases in which the liability arises by reason of inheritance of property, and is a liability to provide maintenance out of such property. It applies to persons whom the late owner was bound to maintain. The facts that the son's right to maintenance arises out of the father's possession of impartible estate, and is a right to be maintained out of the estate, do not make it a right of unique or even exceptional character or involve the consequence at Hindu law that the income of the estate is not the father's income.

... It cannot, in their view, be held that the respective chances of each son to succeed by survivorship make them all co-owners of the income with their father, or make the holder of the estate a manager on behalf of himself and them, or on behalf of a Hindu family of which he and they are some of the male members."

[12] The earlier decisions of the Privy Council recognised the right of maintenance of the members of the family, who, if the property was partible, would be entitled to claim maintenance out of it. In *Raja Yarlagadda Mallikarjuna Prasada Nayudu v. Raja Yarlagadda Durga Prasada Nayudu* (27 I. A. 151 : 24 Mad. 147 P. C.) it was held that the younger brothers of the Zamindar of an impartible estate retained such right and interest in respect of maintenance as belonged to junior members of a raj or other impartible estate descendible to a single heir. From the judgment in that case it appears that the right of younger brothers to maintenance was not seriously disputed, and that the main question raised before their Lordships was about the claim to arrears of maintenance. A different view was taken in *Rama Rao v. Raja of Pittapur*, 45 I. A. 148 : (A. I. R. (5) 1918 P. C. 81) on the ground that the position had changed since the decision in *Sartaj Kuari's case*, 15 I. A. 51 : (10 ALL. 272 P. C.). In that case the last holder (*the Raja of Pittapur*) devised the estate by will to the defendant. The plaintiff was the son of an adopted son of the last Raja and he claimed maintenance. He rested his case on what he alleged was the general law, namely, that by birth he had a right to maintenance out of the property constituting the Raj, which followed the property into the hands of a third party. His claim was negatived. To quote from the judgment, which was delivered by Lord Dunedin (p. 153):

"But the decision of the Board (in *Sartaj Kuari's case*), 15 I. A. 51 : 10 ALL. 272 P. C.) which binds their Lordships made that view no longer tenable. It settled that in an impartible zamindari there is no coparcenary....

It was admitted on both sides of the Bar that in an ordinary joint family ruled by the Mitakshara law the junior members, down to three generations from the head of the family, have a coparcenary interest accruing by birth in the ancestral property; that this co-

parcenary interest carries with it the inchoate right to raise an action of partition, and that until partition is *de facto* accomplished these same persons have a right to maintenance. It seems clear that this right is an inherent quality of the right of coparcenary — that is, of common property. The individual enjoyment of the common property being ousted by the management of the head of the family, they have a right till they exercise their right to divide, to be maintained out of the property which is common to them, who are excluded from the management, and to the head of the family who is invested with the management."

At p. 154 it is stated:

"An impartible zamindari is the creature of custom, and it is of its essence that no coparcenary exists. This being so, the basis of the claim is gone, inasmuch as it is founded on the consideration that the plaintiff is a person who, if the zamindari were not impartible, would be entitled as of right to maintenance."

It was also observed (p. 154):

"This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom, so custom may and does affirm a right to maintenance in certain members of the family."

It was pointed out that there are certain relations such as the widow, the parents and an infant child, in regard to whom the holder of the estate has by reason of their relationship to him a personal obligation to maintain them and this obligation is independent of the fact of there being ancestral or joint family property. The Privy Council also held in the same case that the right of sons to maintenance from an impartible estate had been so often recognised that it was not necessary to prove the custom in each case, and that it was this which would explain the reference to rights of maintenance in cases decided subsequent to the decision in *Sartaj Kuari's case*, (15 I. A. 51: 10 ALL. 272 P. C.) e. g. *Yarlagadda Mallikarjuna's case*: (27 I. A. 151: 24 Mad. 147 P. C.). With regard to other relations their Lordships stated (p. 155):

"We can find no invariable or certain custom that any below the first generation from the last raja can claim maintenance as of right."

This case was referred to in *Bajinath Prashad Singh v. Tej Bali Singh*: (48 I. A. 195: A. I. R. (8) 1921 P. C. 62), and Lord Dunedin, who had also delivered the judgment in this case, in his judgment in the latter case at p. 211 stated as follows:

"Turning next to *Rama Rao v. Raja of Pittapur*: (45 I. A. 148: A. I. R. (5) 1918 P. C. 81) it must be always remembered that the claim for maintenance as put forward was made, not against the head of the family of which the claimant was a member, but against the donee, who on the claimant's own allegation was a stranger to the family. It obviously could not, therefore, succeed unless it was of the nature of a real right. Now it could only be of the nature of a real right, no proceedings having taken place before the estate got into the hands of the donee, if the maker of the claim had before that event been a person who was in some way an actual co-owner of the estate, and any observations

which go to the question of maintenance apart from the question of real right may be treated as obiter dicta."

[13] Both these cases were considered in *Protap Chandra Deo v. Jagadish Chandra Deo*, (54 I. A. 289: A. I. R. (14) 1927 P. C. 159). In that case the family was joint and undivided and governed by the Mitakshara School of Hindu law. The last holder of the estate, which was impartible, bequeathed it by a will to the defendant. The plaintiff was a member of the undivided family and would have succeeded to the estate had it not been devised to the defendant. He claimed maintenance. But this was refused by the Privy Council on two grounds, firstly, that maintenance had already been provided for by grant of certain villages, and secondly, because he had failed to establish a right to maintenance by custom or relationship to the holder of the estate. Reliance was placed in regard to the second ground on the decision in *Rama Rao v. Raja of Pittapur*, (45 I. A. 148: A. I. R. (5) 1918 P. C. 81). These decisions were followed in *Vikrama Deo Maharajulum Garu v. Vikrama Deo Garu*, 24 C. W. N. 226: (A. I. R. (6) 1919 P. C. 126). In that case maintenance was claimed by a brother's son of the late Maharaja. In the trial Court both parties proceeded on the basis that according to the general Hindu law the plaintiff, being the son of a brother of the late Maharaja, was entitled to maintenance out of the estate. The defendant alleged a special custom which, according to him, deprived the plaintiff of his *prima facie* right, and as this was not proved, the plaintiff's claim was decreed. In appeal the Privy Council re-affirmed the decision in *Rama Rao v. Raja of Pittapur*, (45 I. A. 148: A. I. R. (5) 1918 P. C. 81) that apart from custom and certain near relationships to the holder of an impartible estate, the junior members of the family have no right to maintenance out of it and framed an issue, whether according to custom the plaintiff was entitled to maintenance out of the income of the zamindari, and sent the case back for trial on this issue. The same view was taken in *Shiba Prasad Singh v. Prayag Kumari Debi*, (59 I. A. 331: A. I. R. (19) 1932 P. C. 216); see the passage from the judgment in this case quoted above. In *Collector of Gorakhpur v. Ram Sundar Mal*, 61 I. A. 286: (A. I. R. (21) 1934 P. C. 157) at page 302, the Privy Council observed:

"One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as, for instance, the *Challapalli* case, which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family....."

These observations led the Lahore High Court to hold in *The Commissioner of Income-tax*,

Lahore v. Krishnan Kishore, I. L. R. (1939) Lah. 520: (A. I. R. (27) 1940 Lah. 113 S. B.) that the members of a joint family have a right to maintenance which arises from their right in the property of the joint family, of which they are co-owners. The Madras High Court took a similar view in *Commissioner of Income-tax v. Zamindar of Chemudu*, 57 Mad. 1023: (A. I. R. (21) 1934 Mad. 608). These decisions were not approved by the Privy Council: see *Commissioner of Income-tax v. Dewan Bahadur Dewan Krishna Kishore*, 68 I. A. 155: (A. I. R. (28) 1941 P. C. 120). In that case the previous decisions of the Privy Council were reviewed, and at p. 177 their Lordships of the Privy Council stated that the law as declared in *Bajinath Prashad Singh v. Tej Bali Singh*: (48 I. A. 195: A. I. R. (8) 1921 P. C. 62) and *Shiba Prasad Singh v. Prayag Kumari Debi*: (59 I. A. 331: A. I. R. (19) 1932 P. C. 216) had not been unsettled by *Collector of Gorakhpur v. Ram Sundar Mal*: (61 I. A. 286: A. I. R. (21) 1934 P. C. 157). The view that apart from custom the other members of the family have no right to maintenance was reaffirmed, and at pages 176 and 177 it was observed:

"Single heir succession is inconsistent with any son having the same right in respect of income as he would have had in the income of partible property, and the use of the word 'maintenance' to describe the latter right cannot be allowed to confound the two. The right to maintenance in the former case is a right of a different character from that of a co-sharer to enjoy his share and live upon his own property by way of joint possession. To represent that custom takes away the right to maintenance from some members but leaves it to others does not explain the facts as to impartible estates. The son's right of maintenance out of impartible property cannot be accounted for as an original and separate right untouched when custom takes away his right to joint possession. It is not something that is left after something else has been subtracted. It is a different right given sometimes to sons only and sometimes to others in consequence of the impartible character of the property; being sometimes a right of maintenance simply, and sometimes a right to a maintenance grant of lands. In their Lordships' judgment, it can only be ascribed to custom, as has repeatedly been held."

In the same case at p. 177 their Lordships stated that they did not find it necessary to answer questions hitherto undecided with respect to maintenance. But in the subsequent case *Raja Velugoti Sarvagna Kumara Krishna Yachendra Bahadur Varu v. Raja Rajeswara Rao*, (68 I. A. 181: A. I. R. (29) 1942 P. C. 9), the observations made in this case were relied upon for holding that in the absence of a custom to the contrary a junior male member of a Sudra family has under the Hindu law no right to be paid maintenance out of the joint family impartible property. A case involving the right of maintenance of an illegitimate son, whose father belonged to a higher caste, was considered by

the Privy Council in *Bhima Deo v. Chakrapani Deo*, A. I. R. (32) 1945 P. C. 102 : (I. L. R. (1945) Kar. P. C. 266). The case was decided on another point, and the question whether an illegitimate son of the last holder is entitled to maintenance from the impartible estate was left open.

[14] Relying on the above decisions of the Privy Council, the effect of which has been summarized by me above, it has been contended on behalf of the defendant that the ordinary right of maintenance enjoyed by members of a joint family and illegitimate sons ceases to exist when the property is impartible, that such property is property of a different character with incidents of its own, that "it is not that something that is left after something else has been subtracted.", that no person can claim maintenance from such property, which is the creature of custom, unless this right is given to him by custom and that the plaintiffs are not entitled to maintenance, as they have not proved any custom which gives them this right and as they are not so related to the defendant as to impose on him a personal obligation to maintain them. On the other hand reliance is placed by the appellants-plaintiffs on the following observations made by the Privy Council in *Neelkisto Deb Burmono v. Beerchunder Thakoor*, 12 M. I. A. 523 at p. 542 : (3 Beng. L. R. P. C. 13 P. C.) and cited with approval in *Bajinath Prashad Singh v. Tej Bali Singh* 48 I. A. 195 at p. 212 : (A. I. R. (8) 1921 P. C. 62) and *Shiba Prasad Singh v. Prayag Kumari Debi*, (59 I. A. 331) at p. 345 :

"Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom."

It has been urged on the plaintiffs' behalf that the basis of the decisions of the Privy Council in the cases in which they have rejected claims for maintenance is that in impartible property there is no coparcenary, that consequently the junior members of the family, who otherwise as co-owners and by reason of joint possession and community of interest would be entitled to receive maintenance so long as there is no partition, lose their right of maintenance, that in the case of regenerate classes an illegitimate son is not a coparcener or co-owner, that his only right in the ancestral property is a right to receive maintenance from it, that this right has not been taken away by the custom which made the property impartible, and that he consequently continues to possess this right, which has been given to him by Hindu law.

[15] I do not think that the argument advanced on behalf of the plaintiffs can be accepted. It is true that amongst the regenerate classes,

to which the parties in this case belong, an illegitimate son is not a coparcener or a co-owner of the joint family estate. He is entitled to maintenance only, but this is awarded to him in lieu of inheritance and in recognition of his status as a son. If the property, though it may be ancestral or joint family property, is impartible, even a legitimate son cannot, during the lifetime of his father, claim any interest or rights in it, apart from the right to maintenance given to him by custom, which has been judicially recognised. He is not a co-sharer with his father and the income from the estate is the absolute property of his father. He cannot ask for partition or separate possession of a share of the estate. If he is the eldest son, he possesses the right to succeed to the estate by survivorship. This right can also be defeated by the father by alienating the property. The other legitimate sons do not enjoy even this right, unless the eldest son dies without male issue. They are not entitled to any share in the estate or its income. An illegitimate son is not in and cannot be given any higher position. He is awarded maintenance by reason of his being disqualified from receiving a share in the inheritance, which he would have been entitled to get if he had been legitimate. In lieu of exclusion from inheritance, he is entitled to receive maintenance as long as he lives and not only until he attains majority. It has been contended that this right continues even when the estate is impartible, as it is not inconsistent with impartibility. But the right is founded on the consideration that an illegitimate son is deprived of the right to inheritance enjoyed by a legitimate son. In impartible property all legitimate sons are not entitled to inheritance. Consequently, the basis of the claim of an illegitimate son to maintenance goes. But just as impartibility is the creature of custom, so custom may, as observed by the Privy Council, confer upon an illegitimate son a right to maintenance, as it has conferred upon a legitimate son. In the absence of such custom, he is not entitled to maintenance as of right.

[16] The matter can be looked at from another point of view. It is now settled that in the absence of a custom restricting his power of alienation, the holder of an impartible estate has full power to deal with and enjoy it as if it were his separate property. He may transfer or alienate it by gift, will or otherwise, even though it may be ancestral property. The income from the property belongs exclusively to him. In the words of Lord Buckmaster in *Jagadamba Kumari v. Narain Singh*, 50 I. A. 1 at p. 7 : (A. I. R. (10) 1923 P. C. 59).

"It differs in no way from property that he might have gained by his own effort, or that had come to him

in circumstances entirely dissociated from the ownership of the raj."

No person, who is not one of those whom the holder is personally bound to maintain, can therefore claim maintenance from the estate as of right; for such a right would be inconsistent with the right of the holder to alienate. Custom may, however, restrict the holder's power of alienation by making it subject to the right of certain members of the family to receive maintenance from the estate. In this view also, an illegitimate son cannot claim maintenance unless the right to it is given to him by custom.

[17] In this case the plaintiffs alleged the existence of a custom according to which illegitimate sons of the holder of an impartible estate are entitled to receive maintenance from it. But this has not been proved. They are half brothers of the defendant. There is, therefore, no personal obligation on the defendant to maintain them. Maintenance cannot also be claimed on the ground that the last holder, the plaintiffs' father, was legally bound to maintain them, as both of them are majors. The plaintiffs' claim must consequently fail.

[18] Both the appeals are, therefore, dismissed with costs.

[19] **Per Curiam.**—The appellants must pay the court-fee which they would have had to pay had they not been allowed to sue in *forma pauperis*. A copy of this judgment should be sent to the Collector.

[20] **Weston J.**—It seems to me that the question in this appeal turns upon two propositions which, on the authorities set out by my learned brother, must be taken to be well established: (1) An impartible estate is the creation of custom and no coparcenary exists. (2) The right of an illegitimate son to maintenance among the twice-born classes is in lieu of inheritance.

[21] When, therefore, custom has created an estate in which no coparcenary interest accrues to any person by birth, then, just as the ordinary right of a legitimate son to maintenance pending exercise of his right to obtain partition ceases as a legal right, being inconsistent with the non-existence of coparcenary interest, so also the ordinary right of an illegitimate son to maintenance granted in lieu of the right to inheritance enjoyed by the legitimate son will not survive as a legal right. It may exist by reason of custom, general or special. No instance has been cited before us where general custom has been recognized, and special custom, though pleaded, has not been proved.

[22] I agree therefore that the appeals must fail.

D.R.R.

Appeals dismissed.

A. I. R. (36) 1949 Bombay 400 [C. N. 104.]

CHAGLA C. J. AND TENDOLKAR J.

Commissioner of Income-tax, Bombay City v. Mysore Iron and Steel Works—Respondent.

Income-tax Ref. No. 9 of 1948, Decided on 18th March 1949.

Income-tax Act (1922), Ss. 30, 31 and 33—Order of assessment — Appeal to Appellate Assistant Commissioner filed beyond thirty days prescribed by S. 30 with prayer for condonation of delay — Refusal to condone delay — Order is one under S. 30 (2) and not under S. 31 and hence not open to appeal under S. 33.

Under S. 30 an assessee has been given a statutory right to present an appeal against an order of assessment made by an Income-tax officer within 30 days of that order without any order being required from the Appellate Assistant Commissioner for admission of that appeal. But if the time prescribed expires, an appeal can only be entertained provided it is admitted by the Appellate Assistant Commissioner after condoning the delay. Where the Appellate Assistant Commissioner refuses to condone the delay, the appeal does not reach the stage prescribed under S. 31 which deals only with such appeals which are presented within the prescribed time or admitted after the delay has been condoned. Consequently, there is no right of appeal under S. 33 against the order of the Appellate Assistant Commissioner refusing to condone the delay under S. 30 (2): A. I. R. (22) 1935 All. 572, *Foll*; A. I. R. (18) 1931 Pat. 306 (F. B.) and A. I. R. (31) 1944 Pat. 112, *Disting.*

[Paras 3, 4 and 7]

Annotation: ('46-Man.) Income-tax Act, S. 33, N. 1.

G. N. Joshi and N. A. Palkhivala—

—for Commissioner.

H. D. Banaji and P. R. Sunkersett—for Respondent.

Chagla C. J. — This reference raises a very short point as to the construction of Ss. 30 and 31, Income-tax Act, and the facts necessary to be stated are that the Income-tax Officer made an assessment on the assessee on 16th March 1946, and the notice of demand was served on the assessee on 6th April 1946. The assessee wanted to prefer an appeal against that assessment, and the appeal was received in the office of the Appellate Assistant Commissioner, B. Range on 3rd June 1946.

[2] Now under S. 30 a statutory right is given to the assessee to prefer an appeal against an order of assessment made by the Income-tax Officer but a time limit is prescribed within which the appeal has to be preferred, and that time limit is thirty days. Therefore admittedly when the appeal was presented, the appeal was out of time. On that, the assessee made an application to the Appellate Assistant Commissioner for condoning the delay. The Appellate Assistant Commissioner refused to condone the delay and declined to entertain the appeal. From this order of the Appellate Assistant Commissioner an appeal was preferred to the Appellate Tribunal, and the Appellate Tribunal took the view that the order passed by the Appellate Assistant

Commissioner was an order under S. 31, Income-tax Act and not an order under S. 30 of the Act and that an appeal lay from that order to condone the delay; and the Appellate Tribunal directed the appellate Assistant Commissioner to hear the appeal on merits. From that order of the Appellate Tribunal this reference arises, and a question has been submitted by the Tribunal to us for decision, namely, whether the appeal before the Appellate Tribunal against the order of the appellate Assistant Commissioner was competent?

[3] Now, the scheme under Ss. 30 and 31 of the Act is fairly clear. An assessee has a statutory right to present an appeal within thirty days without any order being required from the appellate Assistant Commissioner for admission of that appeal. But if the time prescribed expires, then that statutory right to present an appeal goes; and an appeal can only be entertained provided it is admitted by the appellate Assistant Commissioner after condoning the delay. Therefore before an appeal could be admitted in this case, an order from the appellate Assistant Commissioner was requisite that the delay had been condoned, and it was only on such an order being made that the appeal could be entertained by the appellate Assistant Commissioner. Now, S. 31 deals only with such appeals which are presented within the prescribed period or admitted after the delay has been condoned, and the procedure laid down in S. 31 with regard to the hearing of appeals only applies to such appeals. Therefore, in my opinion, when the Appellate Assistant Commissioner refused to condone the delay, there was no appeal before him which he could hear and dispose of as provided under S. 31 of the Act. Section 33 then gives the right of appeal to the assessee from an order made by the Appellate Assistant Commissioner either under S. 28 or under S. 31. Therefore the legislature did not give the right of appeal to the assessee against an order made by the appellate Assistant Commissioner under S. 30 of the Act.

[4] Now Mr. Banaji has contended that in refusing to condone the delay the Appellate Assistant Commissioner has really dismissed his appeal and confirmed the order of assessment. In my opinion, that is an entirely erroneous contention because the Appellate Assistant Commissioner can only confirm an assessment and make an order of confirmation or dismissal of the appeal provided the appeal is presented within time or been admitted after condonation of delay and is heard and disposed of on merits. In this case we do not reach the stage of S. 31 at all. The appeal never came to be admitted, and no question can possibly arise of an order made by the Appellate Assistant Com-

missioner confirming the assessment made by the Income-tax Officer.

[5] Mr. Banaji has relied on two judgments of the Patna High Court which, in my opinion, really have no bearing on the facts before us. One is *Kunwarji Ananda v. Commissioner of Income-tax, Bihar and Orissa*, 11 Pat. 187 : (A. I. R. (18) 1931 Pat. 306 F. B.). There a Full Bench of the Patna High Court considered an order made by the Assistant Commissioner that the appeal did not lie because it fell under S. 23 (4) of the old Income-tax Act; and the Court held that such an order fell under S. 31 of the old Act as it was an order disposing of the appeal. Now, it is important to note that in that case the appeal was admitted. It was within time, and after it was admitted, a preliminary issue was raised as to whether the appeal lay as it fell under S. 23 (4) of the old Income-tax Act. It was from the order on the preliminary point that an appeal was preferred to the Commissioner, and on those facts the Court held that it was an order under S. 31 of the old Act. But as I have pointed out earlier, in the case before us there is no question of the appeal being disposed of either on the preliminary point or on merits, because the appeal was never admitted.

[6] Then there is the case of *Maharani Gyan Manjari Kuari v. Commissioner of Income-tax*, (1944) 12 I.T.R. 59 : (A.I.R. (31) 1944 Pat. 112). That was a case where the assessee had failed to prefer an appeal in the prescribed form to the Appellate Assistant Commissioner of Income-tax, and the Appellate Assistant Commissioner refused to admit the appeal holding that the appeal was not in the prescribed form. The Patna High Court merely followed the earlier decision of their own Court to which I have referred and came to the conclusion that the order made by the Appellate Assistant Commissioner was an order under S. 31. We have looked in vain through this judgment to find any reason suggested why the order made by the Appellate Assistant Commissioner refusing to entertain the appeal because it was not in proper form fell under S. 31 of the old Act. With respect to the Patna High Court, we cannot accept that decision if the effect of the decision is that even though an Appellate Assistant Commissioner may refuse to entertain an appeal, that order should be deemed to be an order disposing of the appeal under S. 31 as if the appeal had been admitted. But there is a direct decision of the Allahabad High Court, and that is reported in *Shivnath Prasad v. Commissioner of Income-tax, U. P.*, (1935) 3 I. T. R. 200 : (A.I.R. (22) 1935 ALL. 572). Although the case was under the old Act, it dealt with the very question with which we are dealing now and there also the Assistant Com-

missioner had refused to condone the delay and the Allahabad High Court held that the order made by the Assistant Commissioner was not under S. 31 but it was an order made under S. 30 and therefore, no appeal lay to the Appellate Tribunal. We, with respect, entirely agree with the view taken by the Allahabad High Court and also the reasoning on which that decision is based.

[7] The result is that we must hold that there is no appeal from the order of the Appellate Assistant Commissioner refusing to condone the delay under S. 30, sub-s. (2), Income-tax Act. The answer to the question will, therefore, be in the negative. Assessee to pay the costs.

Tendolkar J. — I agree.

K.S. Answer accordingly.

A. I. R. (36) 1949 Bombay 402 [C. N. 105.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Sumatibai Waman Kirtikar—Plaintiff—Appellant v. Anant Balkrishna Shirgaonkar—Defendant—Respondent.

Letters Patent Appeal No. 2 of 1949, Decided on 22nd February 1949, from judgment of Jahagirdar J., in Second Appeal No. 293 of 1948.

(a) Registration Act (1908), S. 17 (1) (d) — Compromise decree creating lease for term exceeding one year — Decree is registrable under section.

Where by a compromise decree the defendant agreed to continue to occupy the property which had been leased to him and the plaintiff agreed that the defendant should continue to occupy the property for a period exceeding one year and the defendant further agreed to give vacant possession to the plaintiff on the expiry of the period and to pay rent to the plaintiff:

Held that the decree was intended to operate as a lease and that as a lease it was compulsorily registrable under S. 17 (1) (d): A. I. R. (6) 1919 P. C. 79; A. I. R. (31) 1944 Mad. 273 (F. B.); A. I. R. (16) 1929 Cal. 462 and A. I. R. (19) 1932 Pat. 97, *Rel. on.* [Para 8]

(b) Registration Act (1908), S. 17 (1) (b) and (d) — Document of lease falling under cls. (b) and (d) — It must be looked upon as falling under clause (d).

When the legislature enumerates various classes for any specific purpose, if a document falls under one specific class, for the purpose of construction, the Court should put that document in that particular class rather than in a wider or more residuary class.

[Para 4]

Therefore if a document is a lease, although it may also fall under sub-cl. (b) of S. 17 (1), for the purpose of the Registration Act it must be looked upon as falling under cl. (d) and not under cl. (b), because cl. (d) deals with a specific class of documents and not general documents which may fall in some other class.

[Para 4]

K. N. Dharap and V. R. Desai — for Appellant.

K. A. Somjee, S. S. Kavalekar and R. G. Samant — for Respondent.

Chagla C. J. — The question that arises for consideration in this Letters Patent appeal is

whether a compromise decree which operates as a lease requires registration.

[2] The plaintiff in the suit from which this appeal arises executed a lease in favour of the defendant on 1st April 1943, which expired by efflux of time on 31st March 1944. As the defendant did not hand over possession, the plaintiff filed a suit for ejectment on 16th April 1944. On 16th April 1945, a consent decree was arrived at between the parties and it is this decree which calls for an interpretation at our hands. By this decree the defendant agreed to continue to occupy the property which had been leased to him and the plaintiff agreed that the defendant should continue to occupy the property from 1st April 1944 to 30th June 1947. The defendant further agreed to give vacant possession to the plaintiff of the property in suit on 30th June 1947, and the defendant agreed that he would pay to the plaintiff the rent of the suit property in the manner laid down in the decree. As possession was not handed over by the defendant on 30th June 1947, the plaintiff filed a *darkhast* to execute the decree and obtained possession under it. The executing Court ordered execution to issue. From that order there was an appeal preferred to the District Court and the District Court took the view that after 30th June 1947, the judgment-debtor was protected by Act LVII [57] of 1947 and therefore set aside the order of the executing Court. The plaintiff came in second appeal to this Court and Jahagirdar J. held that the decree was not capable of execution because it was not registered. He therefore upheld the order of the District Court, but on a different ground. He then gave a certificate for a Letters Patent appeal, and the appeal now comes on before us for decision.

[3] A very ingenious argument has been advanced before us by Mr. Dharap. According to Mr. Dharap, the provisions contained in the consent decree do not and cannot constitute a lease because they do not conform to the provisions of S. 107, Transfer of Property Act. That section lays down the mode of making leases mentioned therein and it provides that "a lease of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent can be made only by a registered instrument." It further provides that "where a lease of immovable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee." Therefore, argues Mr. Dharap, that as a decree is not an instrument which is executed by both the lessor and the lessee, it is not a lease contemplated by the Transfer of Property Act and therefore it is not compulsorily

registrable. Mr. Dharap wants us to read the document as an order of the Court resulting from a compromise whereby the judgment-debtor is permitted to continue in possession of the property in suit till a fixed date and thereafter to hand over possession to the judgment-creditor, and Mr. Dharap says that this is a decree which he is seeking to execute and there is nothing in law to prevent him from executing such a decree.

[4] Now, in order to decide whether the document is compulsorily registrable or not, we have got to consider the provisions not so much of the T. P. Act as of the Registration Act, and that Act in S. 17 enumerates the documents of which registration is compulsory, and under sub-s. (1), cl. (d) one of such documents is "leases of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent." The only definition given in the Act of a lease is an inclusive and not an exhaustive definition. "Lease" is merely defined as including a *kabuliyat*, counterpart, an undertaking to cultivate or occupy and an agreement to lease. Mr. Dharap's contention is that S. 17 refers only to private documents executed *inter partes* and S. 17 is not intended to apply to decrees of the Court which fall into a different category altogether. This contention is wholly erroneous, because when we look at the scheme of S. 17 it is clear that the Legislature never intended that a decree of a Court could not fall under one or other of the sub-clauses of S. 17. The Legislature on the contrary fully realised that decrees of the Court may fall under one or other of these sub-clauses and therefore it enacted S. 17 (2), Registration Act which excludes decrees or orders of the Court if they fall under cls. (b) and (c) of sub-s. (1) of S. 17. Therefore, although a decree of the Court may fall under sub-cl. (a) or sub-cl. (b) and would have been registrable it does not require registration because of the exemption contained in sub-s. (2). But that exemption is not extended to leases which fall under sub-cl. (d). Now, it is a well-established canon of construction that when the Legislature enumerates various classes for any specific purpose, if a document falls under one specific class for the purpose of construction, the Court should put that document in that particular class rather than in a wider or more residuary class, and therefore if a document is a lease, although it may also fall under sub-cl. (b) of S. 17 (1), for the purpose of the Registration Act, it must be looked upon as falling under cl. (d) and not under cl. (b), because cl. (d) deals with a specific class of documents and not general documents which may fall in some other class. The fallacy underlying Mr. Dharap's argument is that only leases referred to in S. 107, T. P. Act, are made compulsorily registrable by the Regis-

tration Act. That is clearly not so because a lease is really defined by S. 105, T. P. Act, and that section lays down what are the essential ingredients of a lease, and those ingredients are three: A lease must state the premises which are demised, it must state the rent reserved under the lease, and it must state the term during which the lease is to continue. Once, those three ingredients are present in a document, then the document is a lease. Section 107 refers to those documents which are executed by parties and it lays down what is the mode to be adopted in order to make leases of that particular character. But when we turn to the Registration Act and when we find that all leases are compulsorily registrable we cannot cut down that directive of the Legislature and apply it merely to leases of a particular kind enacted in S. 107, T. P. Act.

[5] There seems to be no reason in principle why a lease cannot be made by parties arriving at a compromise of a suit and giving effect to that compromise in a decree of a Court. If two parties agree that one will give a lease of a land to the other and if they want that agreement to be embodied in the decree of a Court, that decree would operate as a lease as much as an instrument executed by two parties making a lease as provided by S. 107, T. P. Act, and therefore we see no reason whatever why if this document can be read as constituting a lease there is anything in law to preclude the Court by embodying it in a decree which it passes as a result of a compromise. Looking to the terms of the document itself there can be no doubt that it is a lease and it does create the relationship of landlord and tenant between the judgment-creditor and the judgment-debtor. It is not a case of the judgment-debtor being permitted to use and occupy the land for a certain period and be required to pay compensation for that use and occupation. It expressly sets out the rent that has got to be paid by the tenant, it fixes the term of the lease, and it requires the tenant to hand over possession at the end of that term. The use of the expression "rent" is very significant and we cannot accept Mr. Dharap's contention that "rent" must be read in the sense of compensation rather than in its strict technical sense. The distinction between rent and compensation is well known and well understood, and if the parties deliberately use the expression "rent" and when we find the other ingredients of a lease present, there is no reason why we should take the view that what the parties agreed upon was not the making of a lease but bringing into existence some other document. There is a further provision in the decree which also goes to show that the document was

intended to operate as a lease. On the failure of the defendant to pay any of the amount which is fixed as rent on its due date, the only right the decree gave to the judgment-creditor was to have it executed for the amount which remained due; it did not entitle the judgment-creditor to take possession of the land on default of payment of rent.

[6] In taking the view that a consent decree can operate as a lease we are accepting the view taken by the other High Courts in India and also a view which in our opinion is implicit in a decision of the Privy Council. We will first refer to the decision of the Privy Council that is reported in *Hemanta Kumari Debi v. Midnapur Zamindari Co.*, 46 I. A. 240 : (A. I. R. (6) 1919 P. C. 79). The Privy Council was considering a suit filed for the specific performance of an agreement which was embodied in a compromise decree, and the question was whether that compromise decree required registration or not. The plaintiff's contention was that the compromise decree was an agreement to lease and he had filed the suit to enforce that agreement. The Privy Council held that the decree did not require registration because according to their Lordships the decree did not create a present and immediate interest in the land; there was no present demise and the lease was to be given only on a contingency happening and therefore the compromise decree did not embody or operate as a lease as required by the Registration Act. Now what is very significant and what is important to note is that in the whole of the judgment the Privy Council proceeded on the assumption that a compromise decree could operate as a lease. But for the assumption it would have been entirely unnecessary to consider the various points that their Lordships considered. The short answer to the defendant's contention would have been that a consent decree cannot operate as a lease and therefore the question of registration did not arise. Therefore we read the Privy Council case as deciding not directly but by necessary implication that a consent decree can operate as a lease, and if it does operate as a lease it would attract to itself all the consequences which the Registration Act lays down. The same view has been taken by the Madras High Court in *Kasim v. Abdul Rahiman*, I. L. R. (1944) Mad. 543 : (A. I. R. (31) 1944 Mad. 273 F. B.) by the Calcutta High Court in *Nazar Ali v. Indra Kumar Sutar*, 56 Cal. 427 : (A. I. R. (16) 1929 Cal. 462) and the Patna High Court in *Sachindra Mohan Ghose v. Ramjash Agarwalla*, 11 Pat. 98 : (A. I. R. (19) 1932 Pat. 97).

[7] The next contention of Mr. Dharap is that assuming this consent decree operates as a

lease, even so he is not precluded from executing his decree and obtaining possession of the property which the judgment-debtor was bound to hand over to him on the expiry of the period stated in the decree. Now, the consequences of non-registration are to be found in S. 49, Registration Act, and those consequences are that "No document required by S. 17 to be registered shall (a) affect any immovable property comprised therein (we are not concerned with (b)) or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered." Mr. Dharap argues that he does not want this decree which he is executing to be received in evidence. The decree is already on the record of the Court and therefore if the Court executes the decree it does not in any way contravene the provisions of S. 49 (c). But it is not the provisions of sub-cl. (c) that Mr. Dharap has got to get over, but the provisions of sub-cl. (a), because by that sub-clause the decree cannot be permitted to affect any immovable property which is comprised in that document, and it is difficult to see how Mr. Dharap's client can get possession of the property under the decree without the decree affecting that immovable property. Mr. Dharap says that if the decree operates as a lease it is the lessee alone who is interested in relying on the terms of the decree for his possession. That again is incorrect because not only the possession of the lessee is attributable to the lease, but the right of the lessor to obtain possession on the efflux of time is also attributable to the terms of the lease, and therefore if the lessor seeks to obtain possession from his lessee at the end of the term of the lease, he is doing so by reason of the fact that the relations of landlord and tenant were established between him and his judgment-debtor. The Court cannot permit him to obtain possession because if it were to do so it is permitting the decree to affect the immovable property which the law prohibits the Court from doing. It is not a case of the Court going behind the decree; it is not open to the executing Court to do so. But the executing Court must give effect to the provisions of the law, and one of the provisions of the law is that contained in S. 49, Registration Act which will not permit any document which is compulsorily registrable and which has not been registered to affect any immovable property comprised in that document.

[8] The result, therefore, is that we agree with Jahagirdar J. that the decree in question was intended to operate as a lease, that as a lease it was compulsorily registrable under S. 17 (1) (d), and that as it was not registered

the judgment creditor cannot obtain possession of the property in suit under the terms of this decree. The result, therefore, is that this appeal will be dismissed with costs.

[9] There are cross-objections with regard to the order of costs made by Jahagirdar J. As the order for costs is purely discretionary, we see no reason why we should interfere with that order. Cross-objections are also dismissed with costs.

V.R.B.

Appeal dismissed.

A. I. R. (36) 1949 Bombay 405 [C. N. 106.]

CHAGLA C. J. AND GAJENDRAGADKAR J.

Biharilal Kalacharan — Appellant v Emperor.

Criminal Appeal No. 550 of 1948, Decided on 6th January 1949, against conviction and sentence passed by Presidency Magistrate, 8th Court, Bombay.

(a) Penal Code (1860), S. 213—Section does not require actual concealment or screening of offence—Receiving illegal gratification with consideration to conceal or screen is sufficient.

Section 213, Penal Code, does not require the actual concealment of an offence or the screening of any person from legal punishment or the actual forbearing of taking any proceedings. It is sufficient if an illegal gratification is received in consideration of a promise to conceal an offence or screen any person from legal punishment or desist from taking any proceedings. Once a person accepts a gratification and if the consideration for accepting that gratification is his concealing the offence or screening the person from the legal punishment, the offence is complete: *The Queen v. Bugess*, (1885) 6 Q. B. D. 141, *Rel. on.*; 37 Bom. 658, *Disting.*; A. I. R. (12) 1925 Cal. 85, *Dissent.* [Para 4]

Annotation: ('46-Man.) Penal Code, S. 213 N. 1.

(b) Penal Code (1860), S. 213 — Consideration — Consideration may be a promise to do something in future or something actually done in past.

The word 'consideration' is wide enough to cover both cases, the case of something having been done or achieved in the past and also the case of something to be done in future. The consideration under S. 213, Penal Code may, therefore, be either a promise to conceal an offence or screen the person from legal punishment or it may be a past consideration, the person having already concealed the offence or screened the person from legal punishment. [Para 1]

Annotation: ('48-Man.) Penal Code, S. 213 N. 1.

(c) Penal Code (1860), S. 213—Screening—What amounts to, is question of fact—Witness most material to prosecution—His mere abstention from giving evidence amounts to screening.

Screening a person from legal punishment does not mean that accused must physically keep away the complainant from the arm of the law or he must physically destroy some evidence on which the prosecution relies. It is not so much a question of law as a question of fact. Thus where A is the most material witness for the prosecution and the chances of conviction in the legal proceedings from which he desires to

screen B would be remote if A makes himself scarce, mere abstention on his part from giving evidence or his mere keeping away from Court amounts to screening.

[Para 5]

Annotation: ('46-Man.) Penal Code, S. 213 N. 1.

(d) Interpretation of statutes—Use of different expressions in statute—Court must find out difference—Expressions, however, may have same meaning—Words "screen" in S. 213, Penal Code and 'save' in Ss. 217 and 218, Penal Code, have same meaning—Penal Code (1860), Ss. 217, 218.

It is perfectly true that when the Legislature uses two different expressions in a statute, the Court must try, if possible, to attribute to each one of such expressions a different legal connotation and by ordinary canon of construction it would be necessary to try and determine what the difference was between the two different expressions used by the Legislature. But there are occasions when the Legislature does use two different expressions without meaning to make any distinction between them. Thus the expression 'screening any person from legal punishment' in S. 213, Penal Code, has the same meaning as the expression, 'saving any person from legal punishment' used in Ss. 217 and 218, Penal Code. [Para 5]

Annotation: ('44 Com.) Civil P. C., Preamble, N. 7 Pts. 74 and 75.

B. H. Lulla—for Appellant.

H. M. Choksi, Government Pleader—

for the Crown.

FACTS.—The accused was a refugee from Pakistan. He was in search of a shop in the Kalkadevi locality. He entered into negotiations with the complainant Mangaldas who had a small shop on the Kalkadevi Road and who wanted a *pugree* (premium) of Rs. 3,500 for handing over possession of the shop. The accused with the aid of the police laid a trap and got the complainant, his brother Bhaichand and two others, arrested for receiving *pugree*, an offence under s. 10 (4), Bombay Rent Restriction Act, 1939, on 15th October 1947. Soon afterwards the accused approached the complainant and suggested that if he was paid a sum of money he would make himself scarce from Bombay and the complainant would not only be acquitted in the *pugree* case but would also regain possession of the shop. The accused having stepped into possession of the shop, handed it over to another person. At first the accused demanded Rs. 5,000, but eventually he came down to Rs. 3,500 for his disappearance from Bombay. It was now the turn of the complainant to lay a trap for the accused. On 13th December 1947, just as he received Rs. 1,000 as part of the money, he was arrested by the police. The accused was then tried for an offence punishable under S. 213, Penal Code, convicted of the offence, and sentenced to undergo rigorous imprisonment for one month and pay a fine of Rs. 400. The accused appealed to the High Court.

Chagla C. J.—[After dealing with questions of fact in the case, His Lordship proceeded:]

Mr. Lulla has then raised a rather interesting point of law. According to him even assuming that the prosecution have established their case against the accused no offence in law has been committed. According to Mr. Lulla under S. 213 it is only when the accused actually screens any person from legal punishment that the offence is complete. According to him the mere promise to screen a person from legal punishment and to receive gratification for that promise does not constitute an offence. We are unable to accept that contention. Looking to the plain meaning of the section, apart from any authority, it seems to us that the mischief that is aimed at by the Legislature is the accepting of a gratification for concealing an offence or screening any person from legal punishment or not proceeding against any person for the purpose of bringing him to legal punishment, and not the actual concealing of an offence, or the screening of any person from legal punishment or not proceeding against any person for the purpose of bringing him to legal punishment. Once a person accepts a gratification and if the consideration for accepting that gratification is his concealing the offence or screening the person from legal punishment, the offence is complete. The consideration may be either a promise to conceal an offence or screen the person from legal punishment or it may be a past consideration, the person having already concealed the offence or screened the person from legal punishment and receiving gratification for having rendered that service. It is unnecessary to state that in law a consideration may be as much a promise as something actually done or achieved. Mr. Lulla contends that the Legislature does not enact that if a person receives gratification in consideration of his agreeing or promising to conceal an offence, or screen any person from legal punishment, he would be guilty of an offence. According to Mr. Lulla, if the Legislature intended to punish even an agreement or promise to conceal or screen, then those words should have found a place in the section. In our opinion, there is very good reason why those words do not find a place in the section. Because if those words had been placed there by the Legislature then the consideration would have referred only to something to be done in future. It would not have covered the case of past consideration. The neutral word used by the Legislature 'consideration' is wide enough to cover both cases, the case of something having been done or achieved in the past and also the case of something to be done *in futuro*. The other difficulty that arises if we were to accept the interpretation put upon the section by Mr. Lulla is as to the point of time when

it could be said that the offence was complete. If we accept Mr. Lulla's interpretation, then the offence would not be complete when the accused received the gratification, but it would only be complete when the offence was concealed or a person was screened from legal punishment. Therefore, if the accused took a gratification after having promised to conceal the offence or screen the person giving gratification from legal punishment if he chose to break his promise and not stand by his agreement then no offence would be committed, although he received both the gratification and committed a breach of the agreement *quæ* the person who gave him the money. But the offence according to Mr. Lulla would only be committed if he received the gratification and further went on to keep his promise and abide by his agreement. Unless the words of the section were clear and plain and compelled us to place that interpretation upon it, we think that the interpretation suggested by Mr. Lulla results in serious difficulties and anomalies and should not be accepted.

[2] Reliance is placed on a decision of the this Court in *Emperor v. Sanalal Lallubhai*, 37 Bom. 658: (14 Cr. L. J. 453). Batchelor and Shah JJ. were considering a case where one Gordhandas gave certain jewellery to one Manilal by way of *jangad* and Manilal pledged the same with one Sanalal under circumstances which constituted such pledging an offence of criminal breach of trust. The jewellery was later returned by Sanalal to Gordhandas on the latter undertaking not to prosecute Manilal for the offence of criminal breach of trust. Manilal was tried for the offence of criminal breach of trust with regard to the jewellery and was acquitted. Sanalal and Gordhandas were then tried for offences under Ss. 213 and 214 and the charge against them was that they offered and took restitution of property in consideration of screening an offence, and the two learned Judges held that the accused must be acquitted in that the offence of criminal breach of trust had not been proved and therefore no offence could be committed under Ss. 213 and 214. Now, really that case has not much bearing upon the facts that we have to consider; because there it was found that there was no offence whatsoever which could be concealed or in respect of which any person could be screened. Once the person who offered the bribe was acquitted and it was held that he had committed no offence, then the person accepting the bribe and promising to screen him from legal punishment could not naturally be convicted under S. 213. Because it could not be said that he had received any gratification in consideration of his concealing an offence or screening any person from legal punishment as there was no

offence to conceal and no person to screen from legal punishment. The very basis of S. 213 is that there must be an offence committed which can be concealed and there must be an offender who has to be protected from legal punishment.

[3] The case most strongly relied upon by Mr. Lulla is a decision of the Calcutta High Court reported in *Hemchandra Mukherjee v. Emperor*, 52 Cal. 151 : (A. I. R. (12) 1925 Cal. 85 : 26 Cr. L. J. 345). That is a case directly in point and there a Divisional Bench of that Court consisting of Newbould and Mukerjee JJ. came to the conclusion that there must be an actual concealment of an offence, or screening of a person from legal punishment, or abstention from proceeding criminally against a person in order to attract the application of S. 213. There would be no offence if a gratification was accepted merely on a promise to conceal, screen or abstain and nothing more. Now, with very great respect to these two learned Judges, we are unable to accept that decision as a correct decision. Mukerjee J. realised the difficulty in which he found himself in giving that construction to the section, because at the bottom of p. 156 the learned Judge says :

"Actual concealment or screening even for a short time may be sufficient, but there must be some concealment or screening actually proved."

Now, why "some concealment or some screening actually proved"? If the construction is, what the learned Judges of the Calcutta High Court suggest the correct construction of S. 213, then it is not the case of "some concealment" or "some screening" to be proved. Full and complete concealment or screening, and effective concealment or screening would have to be established before it could be said that the offence was committed under S. 213. It is difficult to see how there can be any half way house between the two interpretations. Either, the actual concealment or screening has nothing to do with the commission of the offence, the commission of the offence being complete as soon as the gratification is received; or the law intended that the offence was only committed after the offence was concealed or the person was screened from legal punishment. In the latter case, the prosecution would have to establish the actual and complete concealing of the offence, equally the actual and complete screening of the person from legal punishment. Mukerjee J. also points out that the Legislature has not used the words "agreeing or promising to conceal." As we have pointed out earlier, there is very good reason why the Legislature did not use that expression.

[4] There is also an English case to which our attention has been drawn by the Govern-

ment Pleader. Of course there is no question of construing a section of the Code in England since the Criminal law is based upon common law. But the principle enunciated in this case is of some assistance to us in construing this section. The decision is *The Queen v. Burgess*, (1885) 6 Q. B. D. 141. In that case there was an indictment for compounding a felony and it was urged that the accused was entitled to an acquittal because the indictment did not allege that he had desisted from prosecuting the offender, or, in other words, that he had fulfilled his promise on the basis of which he had received the illegal gratification, and Lord Coleridge C. J. in his judgment points out that to accept the contention of the defence that there could be no offence unless there was actual desisting from prosecuting the felon would result in enormous difficulties and the pertinent question the learned Chief Justice asks is: When could the offence be said to be complete? He gives the illustration of a man who might conceivably make an illegal agreement not to prosecute and abstain from prosecuting for six years and then might turn round and prosecute after all in breach of the agreement. According to the contention of the accused he could not be guilty of the offence because he did ultimately prosecute, and if so it is difficult to see when such an offence could be said to be complete. He also refers to the extraordinary position which would arise if that construction was accepted, namely, that if the maker of an agreement kept the agreement, he was guilty of an offence; but if, in addition to making such an illegal agreement he is guilty of the further fraud towards the other party of breaking it, he was guilty of no offence at all. It is unnecessary, without very strong reason, to put oneself on the horns of such an extraordinary dilemma, and we do not think that the language of S. 213 drives the Court necessarily to those horns. We, therefore, are of the opinion that S. 213 does not require the actual concealment of an offence or the screening of any person from legal punishment or the actual forbearing of taking any proceedings. It is sufficient if an illegal gratification is received in consideration of a promise to conceal an offence or screen any person from legal punishment or desist from taking any proceedings.

[5] The other argument urged by Mr. Lulla is that on the facts of this case it could not be said that there was any screening, or any promise to screen the complainant from legal punishment. Mr. Lulla says that screening in this context can only mean that the accused must physically keep away the complainant from the arm of the law, or he must again physically

destroy some evidence on which the prosecution relies. Mere abstention from giving evidence or mere keeping away from a Court of law would not be sufficient to constitute screening. For this purpose, Mr. Lulla has drawn our attention to the language of ss. 217 and 218 where the language used is not screening any person from legal punishment, but saving any person from legal punishment, and it is urged that the Legislature has used these two different expressions with deliberate intent, that in the case of saving any act on the part of the accused would be sufficient even by his refusing to give evidence, but in the case of screening something more than that would be necessary. Now, it is perfectly true that when the Legislature uses two different expressions in a statute, the Court must try, if possible, to attribute to each one of such expressions a different legal connotation and by ordinary canon of construction it would be necessary to try and determine what the difference was between screening and saving, two different expressions used by the Legislature. But there are occasions when the Legislature does use two different expressions without meaning to make any distinction between them. And when we turn to the Oxford English Dictionary because the Legislature has not chosen to define screening or saving, we find that as far as the English language is concerned, although it boasts of having no synonyms, there is hardly any difference between the two words screening and saving. The Oxford Dictionary gives the various meanings of the word screen, and one of them which is pertinent to the question before us is this:

'To shield or protect from hostility or impending danger; especially to save (an offender) from punishment or exposure; to conceal (a person's offence).'

Therefore, when you are screening a person from punishment or exposure, screening is the same as saving a person from punishment of an offence or exposure. Therefore we do not think there is any force in the contention that mere abstention from giving evidence is not necessarily screening a person from legal punishment. It is not so much a question of law as a question of fact. In this particular case the accused was the complainant in the *pugree* case. He had offered the *pugree* to the complainant. He would undoubtedly be a most material witness for the prosecution and the chances of the conviction of the complainant would indeed be rather remote if the complainant made himself scarce, left Bombay and went away to Delhi. Therefore on the facts of this case it cannot be said that if the prosecution has established that the accused promised not to give evidence in the *pugree* case he would not be screening the complainant from legal punishment.

[6] The result is the appeal fails and the conviction and sentence must be confirmed. The accused to surrender to his bail.

D.R.R.

Appeal dismissed

*A. I. R. (36) 1949 Bombay 408 [C. N. 107.]

BAVDEKAR AND JAHAGIRDAR JJ.

Shivprasad Ganpatram Mehta—Plaintiff—Appellant v. Natwarlal Harilal Joshi and others—Defendants—Respondents.

First Appeal No. 305 of 1945, Decided on 10th December 1948, from decision of Civil Judge (Senior Division), Ahmedabad, in Special Suit No. 754 of 1940.

* Hindu law—Adoption—Mother giving son in adoption—Father lunatic and incapable of giving assent—Adoption is valid.

Where a son is given in adoption by his natural mother and the father though alive is lunatic and incapable of giving his assent, the adoption is valid: A.I.R. (7) 1920 Bom. 220, *Disting.*; *Case law reviewed.*

[Paras 1 and 18]

Purshottam Tricumdas and C. G. Shastri

—for Appellant.

J. C. Shah & N. C. Shah—for Respondents 1, 2 & 3.

Bavdekar J.—The appellant in this case is the step-sister of one Keshavlal Gavrishankar who died on or about 7th November 1933, leaving behind him a widow Kamla but no son. Defendant 1 claims to be the adopted son of this Keshavlal taken in adoption by the widow. There was a dispute between the parties in the trial Court as to whether the adoption as a matter of fact had taken place. But the learned trial Judge held upon overwhelming evidence that the adoption had as a matter of fact taken place, and the learned counsel who appears on behalf of the appellant has conceded his inability to persuade us against that evidence to hold that the adoption had not taken place. The boy was given in adoption by his natural mother. At the time of the adoption his natural father was alive. But even though it was contested in the trial Court that he was insane and incapable of giving his assent, here again upon overwhelming evidence the learned trial Judge found that since the year 1910 the natural father has been a lunatic and incapable of giving assent to the adoption.

[2] The only point which has been argued before us is as to whether upon these facts the adoption would be a valid adoption. The learned counsel who appears on behalf of the plaintiff-appellant contends that the adoption is not valid because the father of the boy given in adoption was alive and had not consented to the adoption as he could not possibly consent being a lunatic. He concedes that during the lifetime of the father the son may be given in adoption

by the natural mother. But he says that in that case she must do so with the consent of her husband, and if the consent of her husband cannot be obtained on the ground that the husband is incapable of consenting, then the adoption is invalid. Modern Hindu law text books seem to suggest that in case the father of the boy given in adoption is a lunatic, then his wife has got the power to give the son in adoption. But when we look to the decided cases which are relied upon in support of this proposition, except in one case, we find that the dicta upon which the text books rely are obiter. Taking up the first authority which is relied upon, viz., *Jogesh Chandra Banerjee v. Nrityakali Debi*, 30 Cal. 965 : (7 C. W. N. 871), it is observed at p. 970 of the report of that case:

"It is laid down by text-writers of authority whose opinion is entitled to much consideration, that a wife may give away her son in adoption after her husband's death, or when he is permanently absent, as for instance, an emigrant, or has entered a religious order, or has lost his reason, provided the husband was legally competent to give away his son, and has not expressly prohibited his being adopted."

The authority quoted in support of this note is Mayne's Hindu Law, 5th Edn., para. 120. Now, we have not been able to get this particular edition of Mayne's Hindu Law. But Mayne's Hindu Law, 10th Edn., 1938, mentions as authorities for the proposition that though a wife cannot give her son in adoption while her husband is alive and capable of consenting, without his consent she may do so after his death, or when he is permanently absent, as for instance, an emigrant, or has entered a religious order, or has lost his reason, Dattaka Mimamsa, IV, 10-12, Dattaka Chandrika, 1, 31, 32, Mitakshara, I, XI, 9, *Arunachellum v. Iyasamy*, 1 Mad. Dec. 154; *Huro Soondree v. Chundermony*, Sevest 938; *Rangubai v. Bhagirathibai*, 2 Bom. 377; *Mhalsabai v. Vithoba K. Gulve*, 7 Bom. H. C. R. (APP.) XXVI. The other cases which are referred to are later and are *Jogesh Chandra Banerjee v. Nrityakali Debi*, 30 Cal. 965 : (7 C. W. N. 871) and *Raja Makund Deb v. Sri Jagannath Janamoni*, 2 Pat. 469 : (A. I. R. (10) 1923 Pat. 423). Now, out of these cases again, the case of *Rangubai v. Bhagirathibai*, (2 Bom. 377), was a case in which the natural father had given his consent to the adoption of his son on certain conditions, one of which was that the assent of Government should be obtained to the adoption. The assent of Government was not obtained to the adoption, with the result that the question arose as to whether the adoption was a valid one when the mother had given the son in adoption without obtaining such consent, and it was then held that :

"According to the Hindu law prevailing in the Bombay Presidency a wife is not competent to give her

son in adoption against the will, express or implied, of her husband, the father of that son, or under circumstances from which the husband's dissent can be inferred."

It is obvious from the facts which are stated that this report was merely concerned with a case in which there was the express prohibition of the husband against the giving of the son except under certain conditions. What was held was that in case certain conditions laid down by the husband had to be fulfilled, if they were not fulfilled, then the mother had no authority to give the son in adoption.

[3] The case of *Mhalsabai v. Vithoba*, (7 Bom. H. C. R. (App.) XXVI), was a case of a son given in adoption by his mother after his father's death, and upon the contention that the widow had given the son in adoption without authority, express or implied, given by husband, it was observed that, "the objection was at variance with the books on Hindu Law." Reliance was placed in support of this observation on I Strange 82, I Strange 81, I Strange 95 and the Mitakshara. In the Mitakshara to which Sir Thomas Strange referred, it was observed that "if the son was given by the mother in the father's absence, or in case of his death, it was a good adoption and with reference to distress the same authority said that the prohibition regarded the giver only."

It was therefore held that

"after the father's death the mother can exercise his power of giving in adoption, and if he had not previously in his lifetime manifested dissent, his assent will be implied."

The ratio of the case, therefore, was that assent was necessary, but when the husband was dead, it will be implied from absence of dissent expressed before death.

[4] The other two cases which have been relied upon, viz., *Arunachellum v. Iyasamy* : (1 Mad. Dec. 154) and *Huro Soondree v. Chundermony*, (Sevest 938), are not available to us, though it appears from West and Buhler's Digest of Hindu Law that the case of *Huro Soondree v. Chundermony*, (Sevest 938), was a case exactly in point, the other case being again a case which was not concerned with an adoption in which the mother gave the boy in adoption without the consent of the natural father. There is thus no authority upon the proposition which we find enunciated in the Hindu law text books. The case of *Mhalsabai v. Vithoba*, (7 Bom. H. C. R. (App.) XXVI) does indeed contain a reference to a passage from Mitakshara which would support the case of the giving of the son in adoption by his mother if the father is absent or is dead, provided it was a correct translation of the Mitakshara. But even though we have tried to obtain as many separate printed Sanskrit text books of Mitakshara as we can, we have not been able to get any

text which can be translated as was done in the case of *Mhalsabai v. Vithoba*, (7 Bom. H. C. R. (App.) XXVI), i. e., if the son is given by the mother in the father's absence or in case of his death, it is a good adoption.

[5] On the other hand, in another case in the same volume, viz. *Narayan Babaji v. Nana Manohar*, 7 Bom. H. C. R. (A. C.) 153, it was mentioned :

"According to the highest authorities in repute in the Maratha country, the express sanction of the husband is indispensable to render valid an adoption made by the wife in his lifetime."

The case was a case of an adoption by one Purshottam who had absconded. He was, therefore, absent, and if there was an authority of the Mitakshara to the effect that if the son was taken in adoption by the mother in the father's absence, it was a good adoption, then in that case the decision would not have gone against the adoption in *Narayan Babaji v. Nana Manohar*, (7 Bom. H. C. R. (A. C.) 153). It is true that the case was a case of taking and Mitakshara may furnish an authority in respect of the wife giving a son in adoption in the father's absence though it contained no such authority when the wife took a son in adoption but no such authority is to be found. It is obvious therefore that we cannot place any reliance upon the translation of the Mitakshara or the extract from the Mitakshara which is to be found in *Mhalsabai's case*, (7 Bom. H. C. R. (App.) XXVI).

[6] The case of *Jogesh Chandra Banerjee v. Nrityakali Debi*, 30 Cal. 965 : (7 C. W. N. 871), which contained the passage which we have quoted above, was itself a case of the giving in adoption of a son by a widow. In the other case which has been relied upon by the Hindu law text books, viz. *Raja Makund Deb v. Sri Jagannath Janamoni*, 2 Pat. 469 : (A. I. R. (10) 1923 Pat. 423), it has been observed "further it appears to be well settled that a mother may give her son in adoption without her husband's express consent in cases where such consent cannot be obtained, as where he is dead or has joined a religious order." The text of Manu has already been quoted in an earlier part of this judgment. In Colebrook's translation the words "with her husband's assent" do not appear. Vijnaneswara's comment is as follows :

"He who is given by his mother with her husband's consent while her husband is absent or incapable though present, or without his assent, after her husband's decease or who is given by his father, or by both, being of the same class with the person to whom he is given becomes his given son (*dattaka*)."

(Mitakshara, c. I, S. 11, v. 9.)

Sir Thomas Strange says:

"Of her own mere authority, the mother cannot, in general, give her son to be adopted, any more than she can adopt, her husband living; unless he have emigrated, or entered into a religious order. But his assent

may be presumed; and, after his death, she does not want it, a widow having this power, and a wife, also, if the distress be urgent" (Hindu Law, Vol. I, pp. 81 and 82).

The Dattaka-Mimansa and the Dattaka-Chandrika both recognise the right of a widow to give her son in adoption on account of the impossibility of obtaining her husband's consent. (Dattaka-Mimansa, IV, 12; Dattaka-Chandrika, I, 31).

[7] But the case itself was a case of a son given in adoption by a widow, with the result that it does not furnish any direct authority upon the question of the powers of a wife to give her son in adoption in the absence of her husband whose consent cannot be obtained on account of lunacy.

[8] We must, therefore, dispose of this question upon the texts of the ancient Hindu law-writers and upon the principles which can be deduced from them. It has got to be remembered that the ancient Hindu law text-book writers did not contemplate all the conditions which have arisen as society advanced. It is true that the particular circumstance upon which we do not find any express authority in ancient Hindu Law texts is one which cannot but have arisen in ancient times, so that as far as that particular circumstance is concerned, it is not possible to say that it was not in their contemplation because the society was at a less advanced stage. But the fact remains that when they stated the law, they stated it with reference to the circumstances which were arising frequently then, and one circumstance which was not in their contemplation was the one with which we are concerned in the present case. That is, where the husband is a lunatic and the wife is called upon to give her son in adoption. In any case there is no specific reference to the powers of a mother to give a son in adoption in these circumstances in any book having authority in Bombay and we shall now proceed to consider the relevant views of the ancient Hindu law writers.

[9] First of all these are the texts of Smriti writers. The principal among them is Manu who says at Ch. IX, verse 168:

माता पिता वा दद्यातां यमद्भिः पुत्रमापदि ।

सदृशं प्रीतिसंयुक्तं स ज्ञेयो दत्तमिः सुतः ॥

This may be translated as:

"He is called a son given whom his father or mother affectionately gives as a son, being alike (by class) and in a time of distress; confirming the gift with water."

It is obvious from this that so far as Manu is concerned, he made no distinction between the power of the father and the power of the mother to give the son in adoption, and this conclusion is supported by an authority which is of paramount importance in the area from which the

present appeal comes before us, viz. Gujarat, that is Nilakantha. He has quoted this verse in his *Dattaka Prakaranam* and quoted with approval the comment of the commentator Madana upon it:

वा शद्धान्मात्रभावे पितैव दद्यात् पित्रभावे मातैव ।

उभयसत्त्वे तु उभावपि मदनः ॥

Gharpure translates it as follows:

"From the word वा it means that if the mother is not present, the father alone may give away the son and in the absence of the father, the mother alone can give away. If, however, both of them are available, then even both, so says Madana."

[10] Then we come to Yajnavalkya Smriti. He says in verse 130 of Dayabhaga as follows:

दद्यान्माता पिता वा यं स पुत्रो दत्तको भवेत्

Here again the father and the mother are both placed on the same level. It is said that the father may give and also the mother may give.

[11] It is true that there is one Smriti writer who lays down restrictions upon the power of the mother, whether in the matter of giving in adoption or taking in adoption and as a matter of fact whenever in this Presidency it has been held there were limitations upon the power of a woman to adopt the principal authority which has been relied upon in support of the proposition that she had no power in a particular case is that writer. His dictum, leaving aside certain other observations with regard to the adoption of an only son, with which we will not be concerned in the present case, is as follows:

न तु स्त्री पुत्रं दद्यात्प्रतिगृहीयाद्वा न्यत्रानुज्ञानाद्भर्तुः

which means that a woman should not give or take a son in adoption otherwise than with the consent of her husband, and it has been argued all along, placing reliance upon this dictum, that the widow has no power to adopt and the contention raised before us relying upon this dictum is that a wife cannot give in adoption unless with the express authority of her husband. Now, if the matter has stood as between these two dicta, it is obvious that greater weight would have had to be given to Manu and Yajnavalkya, the combined authority of which two Smriti writers is obviously greater than that of Vashistha. But the text of Vashistha has been quoted both in the Mitakshara and the Mayukha books which are authority in that part of the presidency from which the case comes before us, and the authors of these two books have acted upon this text to some extent. They have regarded it as of authority and have been at pains to place some restrictions upon the power of a woman to adopt, whether before her husband's death or after her husband's death. The text cannot therefore be ignored on the ground that Manu or

Yajnavalkya places no restriction on the powers of a mother to give or take a son in adoption.

[12] Now, it appears that there was some edition of the Mitakshara available to the author of Stoke's Hindu Law, which gave a verse of which the translation according to Stoke is as follows:

"He who is given by his mother with her husband's consent, while her husband is absent, (or incapable though present) or (without his assent) after her husband's decease or who is given by his father, or by both being of the same class with the person to whom he is given, becomes his given son."

Stoke mentions after the words "(or incapable though present)" and "(without his assent)" that these words are of Balambhat. Now, Balambhat was an author of the commentary upon Mitakshara. If the words were of the commentator, it is not quite clear to us why Stoke mentions those words in the translation which he gives of the Mitakshara. But the printed text of the Mitakshara which has been available to us, Gharpure's 1914 Edition does not give any words which will correspond to the words "incapable though present" or "without his assent."

That text is as follows:

मात्रा भर्तुर्नृणां प्रोक्षिते प्रेते वा भर्तरि तत्रा बोभाग्यां
वाम सवर्णाय यस्मै दीयते स तस्य दत्तकः ।

That means that if we were to follow our own translation "he is an adopted son who is given by the mother with her husband's consent when her husband has gone on a long journey or is dead or who is given by the husband or by both to a person of the same class." We think that Vijnanesvara did not contemplate a case in which the husband would be present and yet at the same time the wife would give the son in adoption. He contemplates cases in which the husband would be absent due to causes such as death or going away on a long journey. In the latter case it would be difficult though not impossible to obtain his consent. In the former it would be impossible to obtain it unless he had consented before his death and yet he makes the consent of the husband necessary in those two cases. For the case where the husband is present, he takes it for granted that the husband will give the boy in adoption himself. It is true that even though that is the natural translation of the Mitakshara, the legal position so far as adoption by a widow in this Presidency is concerned, is that the consent of the husband is not necessary in case he dies without having prohibited the adoption, and the widow can take a son in adoption after his death. But that decision, we find, is based upon the Vyavaharamayukha which is a book of paramount authority in Gujarat and of a sufficient authority in the rest of Western India, though there its authority is subordinate to that of Mitakshara. The leading

case upon the point is *Rakhmabai v. Radhabai*, 5 Bom. H. C. R. (A. C.) 181 and in that case the power of a Hindu widow to adopt a son without the consent of her husband was based upon earlier instances which are referred to at p. 187 of the report of that case and also upon the opinion of Shastris who had been consulted the majority of whom were of the view that a widow could adopt after the death of her husband, if there was no prohibition from the husband during his lifetime. But that does not seem to us to alter the manner in which Vijnanesvara looked at this matter and he thought that the consent of the husband was necessary if he was dead or if he had gone away on a long journey.

[13] Nilakantha also has dealt with the same question. He quoted, first, the dictum of Vasistha which we have already mentioned above, and then in the process of commenting he has restricted the operation of the dictum that the consent was necessary to the case of a woman who was adopting during the lifetime of her husband. He says in this connection :

भर्तृनुज्ञा तु सधवाया एव दृष्टार्थत्वात् विधवायास्तु
तां विनापि । पितुस्तदभावे ज्ञातीनामाज्ञया भवति ॥

That means that the husband's permission, however, is intended only for a woman whose husband is alive for evident worldly reasons: Vyavaharamayukha, Part II, 1924 Edn., by Gharpure, at p. 79. He has given the reason as to why even though there is not in the original text of Vasistha any exception to the rule that the consent of the husband is necessary, he confines the case when the consent of the husband is necessary to those in which the husband is alive. According to Gharpure the translation of the relevant portion of Vyavaharamayukha is as follows :

"But (an adoption) by a widow, (could be made) even without it, by the assent of her father, or in his absence, by that of the *jnati* 'The father should protect (a woman while) a maiden daughter, the husband, when (she is) married, the sons in (her) old age; in their absence their *jnatis*. A woman has no independence at any time.' Thus her dependence on the husband has been mentioned as having reference to a particular state alone. In his absence or owing to his infirmity on account of old age or otherwise, her dependence rests even on her sons, etc."

It is obvious therefore that in giving his reasons as to why the consent of her husband was not necessary in the case of a widow, Nilakantha said that when the husband is alive the consent is necessary because she is dependent at the moment upon her husband. When the husband dies, she would not be dependent on him, and the consent of the husband is therefore not necessary. Therefore he has specifically stated that

a widow has as a matter of fact got an inherent right to adopt. (See Gharpure's "Translation of Vyavahara-Mayukha," Part II, 1924 Edition, pp. 79 and 80.) It would be clear, therefore, that even though the commentators, viz. Vijnanesvara and Nilakantha, were inclined to place a restriction upon the power of a woman to adopt, they were not prepared to say that she had in no case a power to adopt or the power to give in adoption a son except without the assent, express or necessarily implied, of her husband and Nilakantha with whom we will be concerned in the present case because it comes from Gujarat, was prepared to restrict the operation of the dictum of Vasistha to cases in which a woman's husband was alive. It is true that he did not deal with the case which has now arisen before us, i. e. a case in which a woman whose husband was a lunatic gave her son in adoption without her husband's consent because the husband's consent obviously could not be obtained, he being a lunatic. But we are not prepared to take, because Nilakantha did not deal with that question, that he wanted the husband's consent in all cases in which the husband was alive. As a matter of fact if we look at Gharpure's translation, what he means to say is that the condition of the husband's consent cannot possibly be applied to a case in which he is dead. We have no doubt that the words which he has used are capable of bearing the interpretation that he accepted the dictum of Vasistha in so far as it made the husband's consent necessary within his lifetime. But the case before us is not expressly dealt with, and it appears to us, therefore, that it is open to us to deal with the case upon the principles which we can deduce from the texts which we have so far mentioned.

[14] It is necessary to refer now to two other books which are of authority in Gujarat, though that authority is subordinate to that of Nilakantha. They are Dattaka Mimansa and Dattaka Chandrika. These books are not commentaries upon any Smritis. They are independent treatises and among them Dattaka Mimansa is of greater authority than Dattaka Chandrika. Dattaka Mimansa deals at C. IV, v. 10, with the dictum of Vasistha :

न तु स्त्री पुत्रं दद्यात् प्रतिगृहीयाद्वा न्यत्रानुज्ञानाद्भर्तुः ।

The whole of the text is not quoted, but the opening words न स्त्री पुत्रं दद्यादिति are quoted which seems to indicate that the reference here is to the text of Vasistha. That would also be clear from the fact that after mentioning that "with the husband's assent a woman also is competent," the author says, "accordingly, Vasistha adds 'unless with the assent of her husband.'" Then he goes on to refer to the words "whom

his mother or his father give" and "his mother or father give," which are extracts from Manu and Yajnavalkya again and says "As for what is contained in these passages, as intimating the equality of the father and mother; that is merely with reference to the assent of the husband. It would appear therefrom that he was prepared to accept Vasistha in preference to Manu and Yajnavalkya in so far as he said that the assent of her husband was necessary in case he was present. It is true that Dattaka Mimansa, C. IV, vv. 10 and 11 by themselves do not refer to the presence of the husband, but that this has been meant would seem quite clear from Dattaka Mimansa, c. IV, v. 12, which runs as follows:

"It must not be argued that thus the gift of her son by a widow, though during a season of calamity, could not take place, on account of the impossibility of the assent of her husband; analogous (to her incapacity) to adopt. For, by referring to the instance recorded of Galava, such gift may be inferred as legal, and the singular number, indicating independence of another, is used."

Now, this text shows that even though Dattaka Mimansa, c. IV, vv. 10 and 11, has made the husband's assent necessary for the validity of the adoption by the wife or widow, Nanda Pandita, who was a reactionary inasmuch as he said that a widow could not adopt at all unless there was express assent from the husband, has gone on to make a distinction between the cases of giving and the cases of taking. He says explicitly that even though the husband's assent is necessary for taking in adoption, the case of giving stands on a separate footing and in support of this, he relied upon the instance of Galava who was given by his mother in adoption without the permission of his father Vishwamitra. The Dattaka Mimansa which is an authority in Gujarat thus makes a distinction between the cases of giving and the cases of taking, and says that the wife could give in adoption the son, though it says that that could only be done in times of distress. In our view, if Nilakantha had before him the case of giving in adoption by the wife of a lunatic, he would have followed the same line of reasoning. It has got to be remembered that the reason why he says that the consent of the husband is not necessary to the taking in adoption by a widow is that the widow's dependence upon her husband is spoken in reference to a particular condition and if the wife is dependent upon her husband during his lifetime, when he is dead, she is no longer dependent upon him, and so his consent is not needed. It follows logically from this that the consent of the husband is not necessary for giving when he was a lunatic, because if the husband was a lunatic, it could not possibly be said that the widow was dependent upon him.

As a matter of fact, if we refer to the passage from Nilakantha giving his reasons as to why the consent of the husband was confined to those cases in which the woman's husband was alive, he says that the widow was not dependent upon the husband in other circumstances; for example, he refers to old age and infirmity. It is obvious therefore that it could not possibly be said that the widow would be dependent upon her husband in case the husband was a lunatic and we feel quite certain therefore that if Nilakantha had before him the case of giving in adoption by the wife of a lunatic, he would have, following his own reasoning, said that the husband's assent was not necessary. That as a matter of fact, appears to be the view of Dattaka Mimansa C. IV, v. 12.

[15] It is true that Dattaka Mimansa confines itself to the case of the validity of an adoption in which the widow gives a son in adoption during a season of calamity and justifies it by an illustration of a son given in adoption apparently during such a period. But these words which are to be found in the texts of the ancient Hindu law text writers as to a season of calamity have not in any case been insisted upon as a condition precedent to the validity of an adoption. As the Mitakshara mentions Vyavaharadhyaya leaf 54, Side 1, line 3, "दातुरयं प्रतिषेधः" meaning thereby as Balam-bhati and Subodhini both mention "not the taker" so the adoption of a boy given even otherwise than in time of distress is still a valid adoption. In our view, therefore, there is no reason why we should regard a season of calamity as a condition precedent for dispensing with the consent of the father. Nor is there any difficulty in extending the power of giving in adoption from the case of a widow to the wife of a lunatic. If a widow has the power to give a son in adoption that is on one of two possible grounds. She has an independent power to give her son in adoption though it is subject to the paramount authority of the husband who can prohibit her from giving the son in adoption. In that case, a lunatic's wife has the same power subject to the same limitation. In the alternative, if consent is necessary and is dispensed with on the ground of the impossibility of obtaining it, there is no reason why it should be regarded as indispensable in the case of a lunatic's wife. We would ourselves base the power of a lunatic's wife on the ground of her independence which is mentioned more than once in the ancient Hindu law texts.

[16] In that view, we distinguish the case of this Court in *Ramkrishna v. Laxminarayan*, 22 Bom. L. R. 1181: (A. I. R. (7) 1920 Bom. 220). It was held by Sir Norman Macleod and Mr.

Justice Fawcett, without giving any elaborate reasons, that "under Hindu law, the wife of a lunatic cannot make a valid adoption." The case undoubtedly creates some difficulty inasmuch as the text which has been relied upon for the necessity of consent of the husband is the same in the case of giving as in the case of taking. We find, however, that such an eminent authority as Nanda Pandita makes a distinction between the case of giving and the case of taking, and he has stated that the authority of a wife in the case of giving is much greater than in the case of taking. If we look at the matter from the point of view of convenience, which is one of the reasons why the consent of the husband was held necessary in *Narayan v. Nana*, 7 Bom. H. C. R. (A. C. J.) 153, it would be found that there are fewer reasons for making the condition necessary in the case of giving than in the case of taking. Suppose, for example, a person had migrated or gone on a long journey, it was pointed out by this Court that it would lead to considerable inconvenience to hold that the wife is entitled to make an adoption. It may easily happen in that case that the husband may make an adoption in the country in which he has gone and the wife may make an adoption not knowing that as a matter of fact the husband had already adopted. Such a case is not likely to arise in a case where a woman gives a son in adoption. In such a case at the most what may happen is that if the husband finds that an adoption has taken place, he may regard it as having occasioned from a religious point of view a loss to him of a son. The present case is one of a lunatic. But even in such a case one can conceive of a husband having regained sanity and finding that a boy whom he liked better than others had been as a matter of fact lost to the family by having been given in adoption. But in our view, the advantages are much greater than the disadvantages. It is obvious that when a mother gives a son in adoption, she is, in the first instance, assisting some one to obtain a son. That would make for greater acquisition of religious merit by the latter. In the second instance by the giving in adoption the natural son would find a better home and better conditions in life. In our view, therefore, the view which the Dattaka Mimamsa has given in C. IV, v. 12, should prevail.

[17] The learned counsel who has appeared on behalf of the respondent has also drawn our attention to the Dattaka Chandrika, which has been quoted in Mayne, as I have already mentioned, as an authority for the proposition which Mayne enunciates. It mentions in C. I, Cls. 31 and 32 :

"But by a woman, the gift may be made with her

husband's sanction if he be alive, or even without it if he be dead, have migrated or entered a religious order—accordingly Vasistha, 'let not a woman either give or receive a son unless with the assent of her husband.'"

32. Now if there be no prohibition, even there is assent; on account of the maxim : "The intention of another, not prohibited; is sanctioned." Yajnavalkya suggests, the independency of the woman. 'He whom his father or mother gives is a son given.'—Also in another place : 'deserted by his father and mother or either of them.'

In so far as Part I of Cl. 32 is concerned, we think that it would be difficult to apply it in this case. No doubt if a son was given in adoption by a mother, the husband being present, in the absence of any evidence that the husband has expressly dissented, sanction could be easily inferred, but before it could be inferred, there must be in the person whose consent is to be inferred the capacity to prohibit or consent. If the person is a lunatic and he is not capable of consenting, then it is obvious that he is not capable of prohibiting either. The aphorism, "the intention of another, not prohibited; is sanctioned" corresponds to the doctrine applied by English Courts, i. e., silence is consent, and it is obvious that before such silence can be regarded to be evidence of consent, it must be the silence of a person who could have objected which he could not do if he was a lunatic. But we think that Cl. 32 supports the conclusion which we have arrived at from the texts of Manu, Yajnavalkya and Nilakantha inasmuch as the author of Dattaka Chandrika mentions "Yajnavalkya suggests, the independency of the woman" in so far as he says, 'He whom his father or mother gives is a son given.' Also in another place he says : "deserted by his father and mother or either of them." The view which the author of Dattaka Chandrika took therefore was that the mother had got an independent right of giving a son in adoption. The reference obviously is to giving and not to taking.

[18] That, as a matter of fact, has been the view of this Court in *Putlabai v. Mahadu*, 10 Bom. L. R. 1134: (33 Bom. 107). That was a case in which the question arose as to the validity of an adoption of a son who was given by his mother who had remarried after the death of the father. The earlier view which was taken in such cases was different. But in this case it was observed that according to the ancient Hindu law texts having authority in Western India the right of the female parent to give her son in adoption results from the maternal relation and is not derived by delegation from her husband. In support was quoted Manu IX, 168, Yajnavalkya, II, 135, Mitakshara Book XI, 9 and 10. Then it is observed at the bottom of the page:

"In Mandlik's Hindu Law, p. 468, we find the following passage which accords with the conclusions at

which we have arrived. 'The widow's power of giving in her own right has by some been questioned but as it seems to us on very insufficient grounds. In point of fact the texts by themselves are more clearly in favour of her competency to give than her ability to take and all the Digests held authoritative on this side of India are equally pronounced in her favour. Nanda Pandita himself, though he would wish for permission for a widow to take, is obliged to hold that Manu's texts being express in favour of the mother or the father being able to give the widow has the right to give.'

It appears to us that if it is to be held that a widow has got a right to give without the assent of her husband because of Manu's and Yajñavalkya's texts which were expressly in favour of both the mother and the father acting independently, then the least we can do when the wife has given a son in adoption while the husband was living is to confine the dictum of Vasistha that the consent is necessary to those cases in which it is possible to obtain the husband's consent, i. e., in cases in which the husband has gone away some distance though for the purpose of this case it is not necessary to go into the question of the necessity of consent in those cases. In this case in our view, the independent authority of the wife to give her son in adoption could be exercised by her even without the assent of her husband. The adoption was therefore a valid adoption.

[19] In that view of the case, the appeal must be dismissed with costs.

V.R.B.

Appeal dismissed.

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CHAGLA C. J. AND TENDOLKAR J.

Punjabhai Dipchand—Applicant v. Commissioner of Excess Profits Tax, Bombay Mofussil.

Income tax Ref. No. 19 of 1948, Decided on 24th March 1949.

(a) Excess Profits Tax Act (1940), S. 5, Proviso 3—Subject in India starting business in Indian State deliberately and openly—Profits of such business cannot be taxed by resorting to S. 10-A—Excess Profits Tax Act (1940), S. 10-A.

It is always open to a subject to avoid paying income-tax on excess profits tax if he could legally and legitimately do so. The Legislature has exempted profits which accrue in an Indian State from the purview of the Act. Therefore, it is open to a subject in India to start business in an Indian State deliberately and openly, knowing full well that if he makes profits he will not have to pay excess profits tax on those profits. The Excess Profits Tax Officer cannot, therefore, tax such profits by resorting to his powers under S. 10-A.

[Para 2]

Annotation : ('46-Man.) Excess Profits Tax Act, S. 10-A, N. 1.

(b) Excess Profits Tax Act (1940), S. 10-A—Object—Section aims at fraudulent acts on part of assessee.

The section really aims at fraudulent acts on the part of an assessee. Although the word "fraud" is not expressly used, that was obviously the object of the Legislature, viz., that when an assessee who is liable to pay excess profits tax enters into any transaction or transactions or takes resort to some subterfuge or device in order to avoid tax which he is liable to pay, the Excess Profits Tax Officer can act under the powers conferred upon him by S. 10-A.

[Para 2]

Annotation : ('46-Man.) Excess Profits Tax Act, S. 10-A, N. 1.

*Sir Jamshedji Kanga—*for Applicant.

G. N. Joshi and M. C. Setalvad

—for the Commissioner.

FACTS.—The following question was referred to the High Court : "Whether in the circumstances of the case the powers of the Excess Profits Tax Officer under S. 10-A, Excess Profits Tax Act, to make adjustments are in any way fettered by proviso 3 to S. 5 of the Act." The facts leading to this question will be found in the judgment of the High Court.

Chagla C. J.—By this reference the assessee seeks to challenge an order made by the Excess Profits Tax Officer under S. 10A, Excess Profits Tax Act. The assessee is a firm carrying on business at Ahmedabad in piece-goods, and the partners of the firm are one Punjabhai Dipchand and Goculdas Chhotalal. On 28th June 1941, another firm of the same name was started at Jorawarnagar in the Wadhwan State, which is an Indian State, and in that firm Punjabhai and Goculdas were partners and there was also a third partner by the name of Chunilal Tribhovan. This firm made certain profits, and the question is whether the profits of this firm are liable to payment of excess profits tax.

[2] Now, S. 5 of the Act which deals with the application of the Act contains a special exception in the case of business done in an Indian State, and it expressly provides that the Act shall not apply to any business the whole of the profits of which accrue or arise in an Indian State. It is not disputed in this case that as far as the profits of this business started in Wadhwan State are concerned, the whole of the profits accrued or arose in Wadhwan State. But the Excess Profits Tax Officer having failed to get at these profits resorted to a most extraordinary procedure. He availed himself of what he thought were his powers under S. 10-A, Excess Profits Tax Act. That section deals with transactions which are designed to avoid or reduce liability to excess profits tax, and if the Excess Profits Tax Officer is of the opinion that an assessee has entered into any transaction or transactions which are effected with that object, he may, with the previous approval of the Inspecting Assistant Commissioner, make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the

avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction or transactions. Acting under this section and with the previous approval of the Inspecting Assistant Commissioner, the Excess Profits Tax Officer adjusted the liability of the assessee to excess profits tax by adding to their profits accruing in Ahmedabad the profits which accrued to them in the Wadhwan State. I am conscious of the fact that the Income-tax Department has very wide powers given to it under the Income-tax Act and the Excess Profits Tax Act, but I did not imagine that those powers went so far as to permit an Officer of the Department to dictate to an assessee as to how he should carry on business and what methods he should adopt in conducting his business. The Excess Profits Tax Officer seems to have taken the view that there was no reason whatever why the assessee should have started a new business at Wadhwan, and he discusses at some length the arguments which led him to the conclusion that this business was started solely for the purpose of avoiding excess profits tax. Now, it has been often repeated, and very rightly, that it is always open to a subject to avoid paying income-tax or excess profits tax if he could legally and legitimately do so. The Legislature has exempted profits which accrue in an Indian State from the purview of the Excess Profits Tax Act. Therefore, it is open to a subject in India to start business in an Indian State deliberately and openly, knowing full well that if he makes profits he will not have to pay excess profits tax on those profits. There is no liability whatever to pay excess profits tax on profits which accrue in an Indian State. If that be the position, it is impossible to understand how the Excess Profits Tax Officer, by resorting to his powers under S. 10-A, could defeat and override the provisions of the Act itself. What the Excess Profits Tax Officer has really done is to have made the profits accruing in an Indian State liable to excess profits tax, although the Legislature has thought fit to exempt those profits from tax.

Mr. Joshi says he has done so because in his opinion the business was started at Wadhwan in order to avoid the payment of excess profits tax. It is difficult to understand how there can be an avoidance of liability if there is no liability at all. The section really aims at fraudulent acts on the part of an assessee. Although the word "fraud" is not expressly used, that was obviously the object of the Legislature, viz., that when an assessee who is liable to pay excess profits tax enters into any transaction or transactions or takes resort to some subterfuge or device in order to avoid tax which he is liable to pay, then the Excess Profits Tax Officer can act under the powers conferred upon him by S. 10-A. But here we start with this basis that there is no liability whatever on an assessee to pay tax in respect of profits accruing outside British India. If that be so, there cannot possibly be an avoidance of payment of tax within the meaning of S. 10-A of the Act. The motive of the assessee for opening the business is entirely immaterial and irrelevant. It is no concern of the Department how an assessee should conduct and carry on his business, and even if an assessee deliberately chose to start a business in a part of India where no excess profits tax is payable, he was perfectly entitled to do so and he was within the law in doing so. In my opinion, therefore, the order made by the Excess Profits Tax Officer was clearly wrong and in excess of the jurisdiction conferred upon him by the statute.

[3] The question is not properly framed. We will reformulate the question and the question will read thus :

"Whether in view of the provisions of the third proviso to S. 5 of the Act, the Tribunal was justified in holding that S. 10A applies to the case?"

To that the answer is in the negative. The Commissioner to pay the costs.

Tendolkar J. — I agree.

V.R.B.

Answer accordingly.

E N D

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Mr. E. V. Castellino, M.A., LL.B., Advocate, Karachi.

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AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
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THE ALL INDIA REPORTER

1949

Sind Chief Court

A. I. R. (36) 1949 Sind 1 [C. N. 1.]

TYABJI C. J. AND MEHER J.

*Gopaldas Jethmal and others — Appellants
v. The Municipality, Hyderabad, Sind—Res-
pondent.*

First Appeal No. 19 of 1942, Decided on 25th September 1947, from judgment and decree of First Class Sub-Judge, Hyderabad, dated 31st January 1942.

(a) Registration Act (1908), Ss. 2 (6), (7) and 17 (d)—Lease or licence — Municipality granting by deed for 3 years right to collect fees recoverable from butchers at slaughter house—Possession and control remaining with Municipality — Grant held was only a licence and not a lease—Grant did not require registration — T. P. Act (1882), S. 105 and Easements Act (1882), S. 52.

Where a Municipality by a deed of contract granted for 3 years to the defendant a right to collect fees recoverable from the butchers at the slaughter house and an implied right to use the slaughter house for that purpose, but the possession and control of the slaughter house remained with the Municipality, it was held that the contract was only a licence and not a lease of immovable property. The document therefore did not require registration: A. I. R. (25) 1938 Mad, 746, *Dissent.*; A. I. R. (27) 1940 Bom. 369, *Rel. on; Case law discussed.*

[Para 22]
Annotation.—('45-Com.) T. P. Act, S. 105, N. 14; ('46-Man.) Easements Act, S. 52, N. 4; ('45-Com.) Registration Act, S. 2 (6), N. 5; S. 17, N. 31.

(b) Contract Act (1872), S. 73—Damages — Calculation of—Deposit forfeited must be credited.

In a suit for breach of a contract, in calculating damages the deposit forfeited under the contract must be credited to the defendant: A. I. R. (3) 1916 Sind 4, *Rel. on.*

[Para 24]
Annotation.—('46-Man.) Contract Act, S. 74, N. 12.

(c) Contract Act (1872), S. 73—Interest on damages—Interest on damages can be allowed only if it was payable under the terms of the contract.

[Para 28]
Annotation.—('46-Man.) Contract Act, S. 74, N. 10, Pt. 1.

Fatechand Assudomal—for Appellants.
E. V. Castellino—for Respondents.

Meher J.—This is an appeal from a judgment and decree passed against the two appellants by the First Class Sub-Judge, Hyderabad, 1949 S/1

awarding Rs. 7509-12-9 as damages for breach of a contract.

[2] Under the contract appellant 1 had the right to collect fees in the slaughter houses at Hyderabad for three years from 1st April 1936, and appellant 1 had to pay annually Rs. 7,705 in four quarterly instalments, to the respondent. Appellant 1 became very irregular in the payment of the instalments and the Standing Committee of the respondent, the Municipality of Hyderabad, on the recommendation of its Chief Officer, cancelled the contract on 30th November 1937, and directed the Chief Officer to arrange for the collection of the fees departmentally. The Chief Officer thereafter collected the fees from 11th December 1937 to 31st March 1939. Appellant 1 had to pay Rs. 23,115 on the entire contract, out of which he had paid Rs. 9,592-11-0, the balance being Rs. 13,522-4 0. The fees realised by the Municipality departmentally after 11th December 1937 during the contract period amounted to Rs. 8,080-12-6. The Municipality claimed that it had spent Rs. 1,140-1-3 over the establishment for collecting the fees, Rs. 139-9-0 in respect of receipt books and Rs. 325-6-0 as supervision charges. In all the respondent claimed Rs. 9,116-13-0, Rs. 7,021-7-7 being the difference between the sums payable by the appellant in instalments and the sums paid by him, and Rs. 2,095-5-3 as interest at the rate of 9 per cent. up to the date of the suit claimed to be due under the terms of the contract. The respondent Municipality also claimed the right to forfeit the deposit of Rs. 1,926-4-0, which the appellant had deposited with the Municipality, under the terms of the contract. Appellant 2 was surety for appellant 1 under a surety bond executed by him.

[3] Appellant 1 admitted the execution of the contract, but contended that it was not enforceable or admissible in evidence for want of regis-

tration. He further contended, *inter alia*, that he had not committed any breach of the contract and that, therefore, the plaintiff had no right to collect the fees departmentally.

[4] The learned Sub-Judge came to the conclusion that appellant 1 was guilty of a breach of the contract, and that he and his surety (appellant 2) were liable to pay damages to the plaintiff Municipality as claimed by them, except the items of Rs. 1,140-1-3, Rs. 139-9-0 and Rs. 325-6-0, referred to above which he held to be not proved.

[5] The first point taken in this appeal by Mr. Fatehchand for the appellants is that the document containing the contract on which the respondent Municipality based their suit, was not admissible, as it was not registered. It is contended that the contract was a lease of immovable property for three years and required registration.

[6] It is necessary to set out here the terms of the contract, which are as follows:

AGREEMENT

"1. Bhai Gopaldas son of Bhai Jethmal by caste Hindu Bhaibhund, aged about 32 years, occupation contractor, resident of Hyderabad, Sind, agree and give in writing that I have taken lease of recovery of slaughter fee of slaughter houses of Phuleli and Gidu Bunder towns on the following terms from the Municipality of Hyderabad under the Standing Committee's resolution No. 663 dated 18th February 1936 in the sum of Rs. 7705 in words rupees seven thousand, seven hundred and five per year, tenable for three years with effect from 1st April 1936 to 31st March 1939. I agree to pay the consideration of lease in four instalments every year, each on 5th April 1936, 5th July 1936, 5th October 1936, and 5th January 1937. Likewise I shall pay the consideration payable during the remaining years on the above dates. If I failed to pay any instalment within the scheduled period, the Chief Officer has every right either to give me time (for payment) on condition that I shall pay interest of twelve annas per cent. per mensem or in case of extension being refused to cancel the lease or having cancelled to re-auction or carry on the collections departmentally. I shall not claim any interest if any profit thereon accrues to the Municipality, but in case of loss I, my heirs, and representatives shall be bound and liable to make good the loss, thus sustained.

2. I shall receive the following slaughter fees in the aforesaid lease according to the below mentioned rates.

3. I shall pass receipt to every butcher, as is usually done, immediately no receipt of slaughter fees. I shall get the receipt book printed with my monies and shall use them only after they are got sealed from the Municipal Officer.

4. If any butcher did not pay the fee, I shall recover it myself according to law. The Municipality shall have no interest in it and neither shall I summon help from it, nor shall it be bound to help.

5. Only goats and sheep will be slaughtered in the slaughter houses shown in the lease-deed. I shall not allow slaughter of any other animal.

6. I shall permit slaughter of those goats and sheep as are examined and approved by the Municipality's approved doctor and which bear the mark and seal of the Municipality in token of its being approved. The Municipality's approved officer will impress approved seals on

the meat of the slaughtered cattle and the lessor shall not put any obstacle therein.

7. If the (rate of) slaughter is reduced on account of any calamity or disease and I am put to loss, I shall not raise any plea but shall pay the consideration of the lease and the Municipality shall not be bound with me in that respect.

8. If any instalment or any instalments remain to be paid out of the consideration of the lease, the Chief Officer has right to appropriate deposit money, towards (payment of) lease money, and if any notice is given to me, I shall recoup the deposit money within the specified time failing which the Chief Officer is authorised to cancel the lease and forfeit the deposit for which I shall not raise any dispute.

9. I shall be liable and bound by the decision of the Standing Committee for the fulfilment of the above terms or in case of any dispute or confusion.

10. I shall keep deposit of (25) twenty-five per cent. for the fulfilment of the above terms and which will be refunded (to me) after the specified period and compliance of the above terms. But if I made default in complying with the terms, the Chief Officer shall have right to forfeit whole or any part of the deposit, and I shall not take any exception therefor.

RATE OF SLAUGHTER FEES:

Goat each 0 1 6 one anna six pies.
Sheep each 0 3 0 annas three."

[7] Mr. Fatehchand, in support of his argument has relied on the definition of "immovable property" given in cl. (6) of S. 2, Registration Act which includes "any other benefit to arise out of land." He has relied on a case decided by the Madras High Court, *Mahomed Rowther v. Tinnevely Municipal Council* reported in A. I. R. (25) 1938 Mad. 746: (182 I. C. 299) of which the head-note is as under:

"The right to collect the fees of slaughter houses and fish bazaars amount to a profit arising out of land and falls within the definition of immovable property as given in S. 3, cl. 25, General Clauses Act. The letting of such right would therefore fall within the definition a 'lease' as defined in S. 105, T. P. Act, and would require to be executed by both the lessor and the lessee under S. 107, T. P. Act. Where the lease is executed by the lessee and presented for registration by him, but at the time of the registration it is not executed on behalf of the lessor, such lease is invalid."

[8] Mr. Fatehchand has also cited the case in *Sikander and others v. Bahadur and others*, (1905) 27 ALL. 462, where it was held that the right to collect market dues upon a given piece of land was a benefit arising out of land, within the purview of the Indian Registration Act, and that therefore the lease of such a right for a period of more than one year, must be made by a registered instrument.

[9] Stress was laid on Ss. 173 and 174, Bombay Municipal Boroughs Act which are as follows:

"173 (1). The Municipality may from time to time open or close any public market or slaughter-house. It may also either take stallage or other rents or fees for the use by any person of any such market or slaughter-house, or from time to time sell by public auction or otherwise the privilege of occupying any stall or space in or of otherwise using any such market or slaughter house. (2) Any person who, without the permission of or a license from the municipality, shall sell or expose

for sale any article in the said markets or use the said slaughter house, shall be punished with fine which may extend to twenty-five rupees."

"174. It shall be lawful for the municipality to lease by public auction or private contract the collecting of any rent or fees which may be imposed under S. 173 :

Provided that the lessee shall give security for the due fulfilment of the conditions of the lease."

[10] Mr. Fatehchand has argued that the fees paid at the slaughter house were therefore "fees for the use of the slaughter house," and such fees were benefits attached to and arising out of the piece of land where the slaughter house was and fell within the meaning of "immovable property" as defined in cl. (6) of S. 2, Registration Act.

[11] The learned Sub-Judge was of the view that the document did not require registration as the plaintiff had not leased out the slaughter house to defendant 1, but had only assigned the right to collect the slaughter fees. He further observed that there was a distinction between profits arising out of immovable property and profits arising out of the statutory right to collect fees. On this latter point, he relied on the case of *Bhagwant Genuji Girme v. Gangabisan Ramgopal*, A. I. R. (27) 1940 Bom. 369 : (I. L. R. (1941) Bom. 71) a portion of the headnote of which is as follows :

"The claim to levy tolls by Government is based on a statutory right and in Bombay it is conferred by the Tolls on Roads and Bridges Act. The right of the Government to levy tolls under the Tolls on Roads and Bridges Act is neither a benefit arising out of nor an incident of the ownership of Government in the soil of the road under S. 37, Bombay Land Revenue Code. It is therefore not immovable property; and consequently an assignment or extinguishment of the rights of the lessees of the tolls would not be compulsorily registrable under S. 17, cl. (1) (b), Registration Act."

[12] The reasoning in that case is that the benefit to arise out of land necessarily implies a benefit which would arise as an incident of the ownership of the land, that the right to recover toll was not an incident of such ownership, but was independent of the ownership of Government in the soil of the road. This reasoning is applicable here although the facts of the case before us are very different from the facts of this Bombay case.

[13] We are of the opinion that the contract in this case was only a licence and not a lease of immovable property. We are of the opinion that the document in the Madras case cited by Mr. Fatehchand, referred to above (a decision of a single Judge), was not correctly construed as a lease of immovable property.

[14] As regards the Allahabad case referred to above, it appears that what was transferred was a right to hold a market on a private land and it would appear that the transfer by the proprietor of the private land involved a transfer of the exclusive right to use the land and the case is,

therefore, not in point for the decision in the present case.

[15] The distinction between a lease and a licence which depends upon the question whether there was a transfer of a benefit arising out of land is stated in Halsbury's Laws of England, Hailsham Edition, Vol. 20, p. 8, as follows :

"A grant under which the grantee takes only the right to use the premises without exclusive possession operates as a license, and not a lease. In deciding whether a grant amounts to a lease, or is only a license regard must be had to the substance of the agreement. If the effect of the instrument is to give the holder the exclusive right of occupation of the land, though subject to certain reservations, or to a restriction of the purposes for which it may be used, it is a lease; if the contract is merely for the use of the property in a certain way and on certain terms, while it remains in the possession or control of the owner, it is a license."

[16] The point is also referred to in Woodfall's Law of Landlord and Tenant (p. 6, 24th Edition) as follows :

"It has been seen above that there is a demise where a right is granted to the exclusive possession of lands or tenements for a determinate term. A grant of such exclusive possession is a lease although there may be certain reservations or a restriction of the purpose for which the possession may be used, and although it may be described as a license. Nor is an instrument a lease, although it contains the usual words of demise, if its contents show that such was not the intention of the parties."

[17] In the case of the *Indian Hotels Co. Ltd. v. Phiroz Sorabji Contractor*, A. I. R. (10) 1923 Bom. 228 : (88 I. C. 316) it was held by Fawcett J. that, having regard to the definition of licence in S. 52, Indian Easements Act, there is no substantial difference between the Indian and the English law on the subject, and that the words 'right to enjoy' in S. 105, T. P. Act, when read with S. 108 of the same Act, in which the rights of the lessee are stated, clearly show that there must be a right to exclusive possession in a lease under the Transfer of Property Act, and that the question of exclusive possession is the main test to be applied in determining whether a document amounted to a lease or to a licence only. In that case the facts were that the plaintiffs, who were the owners of the immovable property known as the "Wellington Mews," had given cubicles or lock up rooms, each of which was sufficiently large to contain a motor car, for the use of motor car owners and a monthly rent was recovered from these owners. No particular portion of the cubicle was allotted to a particular car, but the cars kept inside took up their position as they happened to come in. It was held that it was not a case in which exclusive possession of any portion of the mews was given, and that the contract in the case was a licence and not a lease.

[18] We might refer to other cases in which the same principle was applied.

[19] In the case *Acting Secy. Board of Revenue v. The Agent, South Indian Rly. Co. Ltd., Trichinopoly*, A.I.R. (12) 1925 Mad. 434 : (48 Mad. 378 F. B.) certain documents by which permission was given by the South Indian Railway Company to consignees of coal to stack coal in station yards on payment of rent were construed as licences and not as leases.

[20] In *Hill v. Tupper* (1863) 2 H. & C. 121 : (32 L. J. Ex. 217) where a canal company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal, it was held that the grant did not create such an interest or estate in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right, but operated merely as a licence.

[21] In *Warr & Co. Ltd. v. London County Council* (1904) 1 K. B. 713 : (73 L. J. K. B. 362) where the contract was expressly in the form of a demise for a term of years of the exclusive right to supply refreshments in the theatre, with the necessary use of the refreshment rooms, it was held that there was no demise of an interest in land, but only a licence.

[22] We think that the principle applied in the above cases is applicable to the case before us. It is not disputed that the possession and control of the slaughter house remained with the respondent Municipality. The agreement in this case did not effect a demise of the slaughter-house, but gave appellant 1 a right to collect fees recovered from butchers at the slaughter house and an implied right to use the slaughter house for that purpose. By the contract, appellant 1 agreed that he would permit the slaughter of only those goats and sheep which were examined and approved by the Municipality's doctor and which bore the mark and seal of the Municipality in token of their being approved. The Municipality's approved doctor was to impress seals on the meat of the slaughtered cattle. There is nothing in the agreement to show that the relationship between landlord and tenant was created or that possession of any kind and much less exclusive possession of the building was to be given to appellant 1. We are of the view that the contract in this case was only a licence and not a lease of immovable property. The document, therefore, did not require registration.

[23] The next point taken in this appeal is that there was no breach of the contract on the part of appellant 1 and that on the contrary it was the respondent Municipality which committed a breach of the contract, when it cancelled the contract on 30th November 1937. Now it is clear from the evidence on record, and it is not disputed on be-

half of the appellants, that from the very beginning appellant 1 was irregular in the payment of instalments and that on the date on which the lease was cancelled, two instalments, each of Rs. 1926-4-0 were over due. But it is contended that the Municipality should, on the first default, have appropriated the deposit money of Rupees 1926-4-0 towards payment of lease money and given a notice to appellant 1 to furnish a fresh deposit, and that as this had not been done, the Municipality had no right to cancel the contract or to carry on the collections departmentally. It has been argued that cl. (8) of the contract must be read along with cl. (1). Now by cl. (8) it was provided that the Chief Officer had the right to appropriate deposit money towards payment of lease money, and on such appropriation to give notice to appellant 1 to furnish a fresh deposit. Clause (10) also gave the Chief Officer the right to forfeit the deposit, if appellant 1 made any default in complying with the terms of the contract. It is clear that cls. (8) and (10) gave additional rights to the Municipality, and did not derogate from the clear terms of cl. (1), under which in case of default of payment of any instalment, the Municipality had the right to cancel the contract and re-auction the collections, or to make the collections departmentally. As appellant 1 was in default to the extent of two instalments in breach of the contract on 30th November 1937 the Municipality clearly had the right to cancel the contract and collect the dues departmentally.

[24] The next point urged is that in calculating damages the learned Sub-Judge was in error in not taking into account the deposit of Rupees 1926-4-0 forfeited by the respondent Municipality. Under cl. (10) of the contract, the Chief Officer of the Municipality had the right to forfeit this deposit in case of any breach on the part of appellant 1. The appellant's contention is that after this deposit was forfeited, it had to be credited to the appellant when damages were computed. This contention appears to us to be correct, and has not been seriously disputed by the other side.

[25] In *Trikamji Jiwandas & Co. v. Trustees of the Port Trust of Karachi*, (1915) 10 S.L.R. 4 : (A.I.R. (3) 1916 Sind 4) the Karachi Port Trust had sued the defendants, who were coal merchants, for a breach of contract to supply coal. The defendants had committed a breach of the contract and the Port Trust had forfeited a deposit. It was held that the plaintiffs could not recover damages without giving defendants credit for the deposit.

[26] The last point taken in this appeal is that the item of interest amounting to Rs. 2095-5-3 up to the date of suit, should not have been included in the amount awarded. In giving rea-

sons for awarding this interest, the learned Sub-Judge has stated :

"The agreement (Ex. 71 Cl. 1) does provide a stipulation for interest at 9 per cent. in case the defendant did not pay any instalment regularly. There has been default, therefore, plaintiff is entitled to claim interest at that stipulated rate."

[27] But the terms of cl. (1) are :

"If I fail to pay any instalment within the scheduled period, the Chief Officer has every right either to give me time (for payment) on condition that I shall pay interest of twelve annas per cent. per mensem or in case of extension being refused to cancel the lease or having cancelled to re-auction or carry on the collections departmentally."

[28] It is clear, therefore, that under this clause interest was payable only on overdue instalments when an extension of time for payment was given by the Chief Officer. This clause cannot be construed to mean that interest had to be paid on all over-due instalments. Interest can be allowed only if it was payable under the terms of the contract. We think, therefore, that this item should not have been allowed by the lower Court.

[29] The result is that the claim allowed by the lower Court has to be reduced by Rs. 1926-4-0, the deposit forfeited by the Municipality for which credit has not been given and by Rupees 2095-5-3 allowed as interest payable up to the date of the suit.

[30] The decree of the lower Court is modified to this extent ; the decree against the appellants will be for Rs. 3,513 3-6 only, and proportionate costs of the suit, and for interest at 6 per cent. per annum from the date of the suit till the date of realisation. The appellants have succeeded in this appeal to the extent of Rs. 4021-9-3. We direct that the respondent Municipality do pay the appellants the costs of the appeal on this amount.

V.B.B.

Order accordingly.

A. I. R. (36) 1949 Sind 5 [C. N. 2.]

THADANI AND CONSTANTINE JJ.

Sm. Gangabai w/o Pessumal and others — Appellants v. Sm. Parmesharibai w/o Topandas and others—Respondents.

First Appeal No. 12 of 1944, Decided on 5th December 1947, from decision of First Class Sub-Judge, Larkana, D/- 15th February 1944.

(a) Hindu law—Joint family—Family property—Joint family business — Property acquired by joint exertions — Property not treated as partnership property — Property is joint family property.

Where property is acquired by members of a Hindu joint family by their joint exertion, in a joint business, and they do not treat the property so acquired as their partnership property, it would be regarded as joint family property : A. I. R. (23) 1936 Sind 217, *Rel. on.* [Para 10]

(b) Hindu Women's Rights to Property Act (1937) (read with Sind Act IX [9] of 1943), S. 3 (2) and (3) — Widow's interest in coparcenary estate

fluctuates in the same way as if her husband had been alive.

Under S. 3 (2), a Hindu widow's interest in her husband's coparcenary estate, so long as she does not claim partition, is liable to be increased or decreased by the death or birth of a coparcener in the joint family in the same way as if her husband had been alive : A. I. R. (32) 1945 Mad. 21, *Rel. on.* [Paras 11, 14]

A Hindu joint family governed by Mitakshara consisted of coparceners A, B and C. C died leaving a widow. Subsequently B died leaving no heirs. In a suit for partition by C's widow under S. 3 (3) :

Held that she was entitled to one-half share in the joint family property and not merely to one-third.

[Para 12]

Annotation : — ('46-Man) Hindu Women's Rights to Property Act, S. 3 N. 1.

(c) Hindu law—Joint family—Family property—Nucleus — Subsequent acquisition — Presumption — Purchase of property by co-parcener — No evidence that purchase was out of separate income — Property is joint family property.

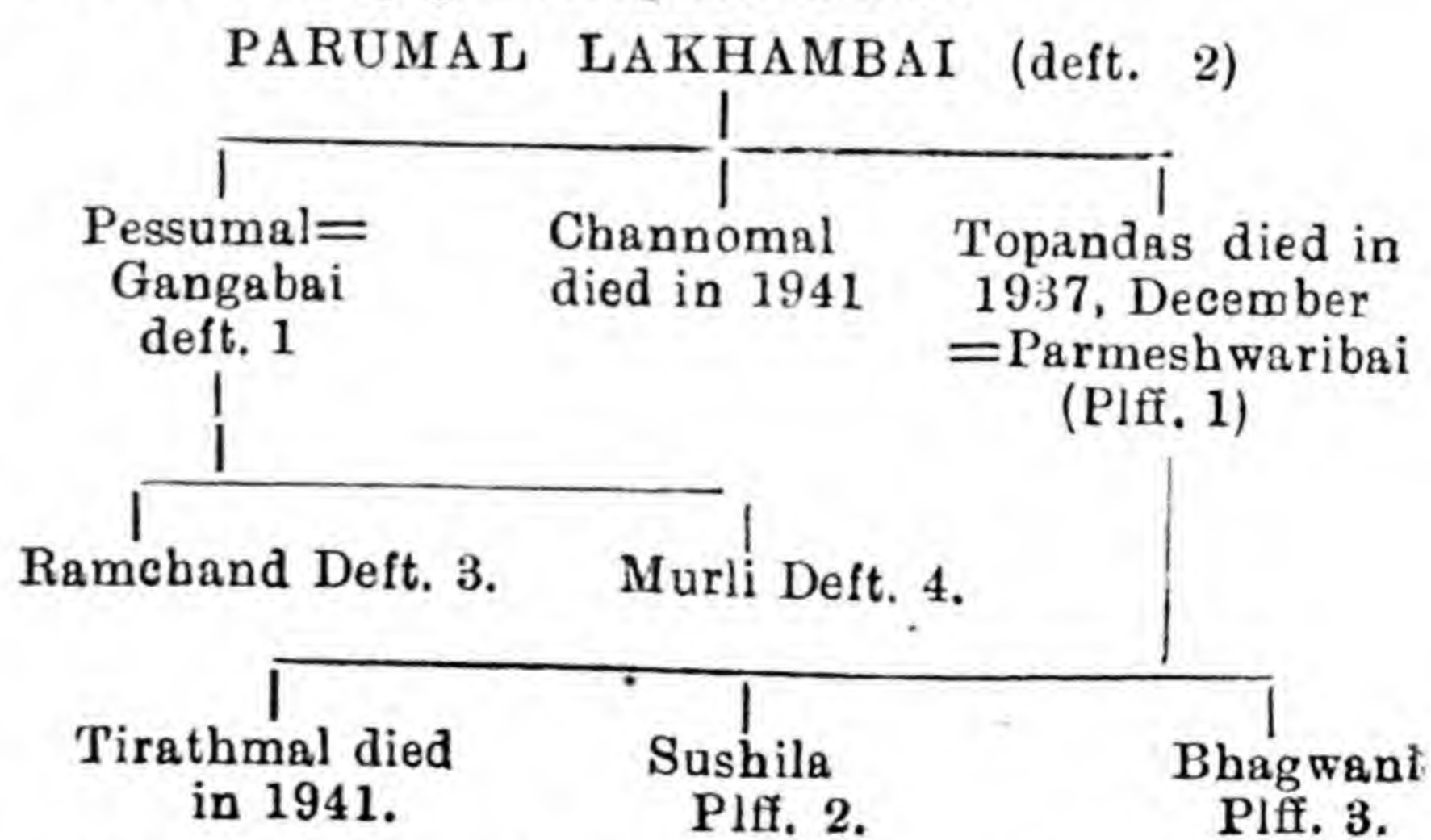
Where there is no evidence that certain property was purchased by a coparcener out of his separate income and where there is a nucleus in the shape of a business which provided income to the joint family, it is reasonable to suppose that it was purchased out of the joint family income and is, therefore, part of the joint family estate : A. I. R. (9) 1922 P. C. 266, *Ref.* [Para 17]

Manghanmal Bhojraj — for Appellants.

Keshowdas Dalpatrai — for Respondents.

Thadani J. — This is an appeal from the decision of the learned First Class Subordinate Judge of Larkana in Suit No. 16 of 1942 in which he passed a preliminary decree for partition and separate possession of the property in suit and appointed a Commissioner for partitioning the property other than the agricultural property and ascertaining the outstandings of the shop and mesne profits. The agricultural property was ordered to be partitioned by the Collector of Larkana.

[2] The suit was instituted by the widow and two daughters of one Topandas against one Pessumal son of Parumal, Shrimati Gangabai w/o Pessumal, Shrimati Lakhambai widow of Parumal, and Ramchand and Murli, two sons of Pessumal for partition and separate possession. The relationship of the parties is shown in the following geneological table :



[3] The respondents' case was that they and

the appellants were members of a Hindu joint family and together owned joint family property shown in Schs. A, B and C; Topandas, the husband of respondent 1 Parmeshwaribai, died intestate on 15th December 1937; at the date of the suit, Tirathmal the son of respondent 1 was dead; she, therefore, as the widow of her husband Topandas had the same interest in the joint family property in suit as her husband by reason of the provisions of the Hindu Women's Rights to Property Act (XVIII [18] of 1937), and that upon partition she was entitled to a share equal to the share of Pessumal. Pessumal died during the pendency of the suit and his widow Gangabai and Pessumal's two sons Ramchand and Murli were brought on the record as defendants 1 A, 3 and 4 respectively. Defendants 3 and 4, being minors were represented by the Nazir of the First Class Civil Court of Larkana as their guardian-ad-litem. Respondent 1 alleged that as the appellants had quarrelled with her and her two daughters and were threatening to dispossess them of the joint family property, she was obliged to bring the present suit.

[4] The appellants' case was that they and the respondents were not members of a Hindu joint family; no property was left by Parmal; the shop goods and outstandings mentioned in Sch. C did not belong to the joint family; the shop business and its outstandings were the exclusive property of Pessumal; the shop goods and outstandings were excessively valued by the respondents; their actual value was considerably less. Pessumal denied the allegation of the respondent Parmeshwaribai that he had any ornaments belonging to Parmeshwaribai with him; there were no ornaments at all belonging to the joint family. Pessumal denied that there was any property belonging to the joint family; he alleged that he and his deceased brother Chainomal were the owners of the properties mentioned in Schs. A and B by purchase; Topandas during his lifetime did not lead a good life and lost a great deal of money in business, and in order to improve his social status he and Chainomal mentioned his name also as a purchaser in the sale-deed.

[5] As regards house No. 5 mentioned in Schedule A, Pessumal contended that it was purchased after the death of Topandas, and that Topandas' widow and his daughters had no interest in it. He further alleged that one Mr. Holaram, an advocate, was appointed an arbitrator to settle the family disputes and he decided that Topandas' widow should have no share in the family property, but should receive Rs. 15 p. m. for her maintenance; this award was acted upon by Topandas' widow and her daughters and they were therefore debarred from bringing

the present suit. The defence of the other appellants was the same as that of Pessumal.

[6] Upon the pleadings the trial Court framed the following issues :

"1. Are plaintiffs and defendants members of the joint Hindu family ?

2. What property or properties belong to the joint Hindu family of plaintiffs and defendants ?

3. Is plaintiff entitled to any shares in the property? If so what is it ?

4. Was there any settlement between the parties as alleged in para 3 (12) of the written statement. If so, what is the effect ?

5. Is defendant No. 2 entitled to any share in the property as alleged in written statement ?

6. Are plaintiffs 2 and 3 entitled to a provision being made for their marriage and maintenance ?

7. Is the suit for partition legally incompetent ?

8. Is the suit not maintainable in the present form ?

9. What order be made about mesne profits ?

10. What should the decree be ?"

[7] Mr. Manghanmal for the appellants has not addressed us on the first issue. He frankly stated that he would be unable to convince us that the finding of the trial Court on this issue was erroneous. On the 2nd issue he confined his arguments to excluding S. No. 99 and certain agricultural property mentioned in Schedule B from the joint family estate. On issue 3 his contention was that Topandas' widow was not entitled to half share as decreed in her favour but to a third only. On the remaining issues, Mr. Manghanmal accepted the findings of the trial Court.

[8] The trial Court came to the conclusion that the parties were members of a Hindu joint family. It relied upon the admission of Pessumal contained in para. 3 (2) of his written statement and which the other defendants to the suit had adopted. One Hemanmal, a partner of the deceased Pessumal in Gur business had stated in his evidence that he had seen Topandas working on Pessumal's shop for 10-15 years; he had also seen Chainomal working on Pessumal's shop. Hemanmal produced accounts kept by Pessumal which showed that Pessumal used to pay Rs. 15 p. m. to Topandas' widow after Topandas' death. The learned Judge thought it was unlikely that, if Topandas and Pessumal were not members of a Hindu joint family, Pessumal would have agreed to pay Rs. 15 to Topandas' widow. The learned Judge also has found that this sum of Rs. 15 was paid to the widow every month out of the earnings of the shop, and came to the conclusion that the shop business was carried on by the three brothers Pessumal, Chainomal and Topandas as a joint family business.

[9] The terms of the award as alleged by Pessumal tend to support the allegation of the respondents that Topandas and his two brothers were members of a Hindu joint family and

owned property as joint family property. At the trial the appellants' advocate Mr. Manghraj had contended that Topandas' widow and his two daughters had relinquished their rights in the joint family property after Holaram had awarded to Topandas' widow Rs. 15 a month as her maintenance. As Holaram was dead, his clerk one Chattomal was examined as a witness by the appellants. From the evidence of this witness it is clear that Topandas' widow claimed a share in the property of her husband, but she was told by Holaram that her son Tirathmal, since deceased, who was then a minor, could claim the property upon attaining majority, and that in the interval she should be content to receive a maintenance allowance of Rs. 15 a month. The learned Judge rightly points out that as Pessumal was then a client of Mr. Holaram he would not be justified in accepting the clerk's evidence in its entirety to the effect that there was a settlement by which Topandas' widow agreed to accept Rs. 15 a month as maintenance in lieu of her share in the property, but it is of considerable significance to the respondents' case that Chattomal should have admitted that Topandas' widow claimed partition of property before Mr. Holaram. The learned Judge then found that the accounts produced by the appellants, Exs. 127 and 128, were accounts of the family business, and while it may be that Topandas' widow was messing separately from Pessumal the evidence as a whole showed that the family was joint in estate.

[10] There was evidence before the learned Judge which he accepted, and we see no reason to take a different view, that the three brothers Pessumal, Chainomal and Topandas jointly conducted the shop business and purchased the properties in suit out of the earnings of the shop business. Judicial opinion undoubtedly favours the view that where property is acquired by members of a Hindu joint family by their joint exertion, in a joint business, and do not treat the property so acquired as their partnership property, it would be regarded as joint family property: see *Manglomal Sugnomal v. Mt. Padibai and another* A.I.R. (23) 1936 Sind. 217: (167 I. C. 444). Upon this material, we think the trial Court was right in holding that the parties to the suit were members of a Hindu joint family and that the property in suit was owned by them as joint family property.

[10a] The next point for our consideration is to what share is the widow of Topandas entitled upon partition of the property in suit. It is common ground that Topandas was a Hindu governed by the Mitakshara School of Hindu Law. It is not disputed that the suit was instituted under the provisions of the Hindu Women's

Rights to Property Act (XVIII [18] of 1937), read with Sind Act IX [9] of 1943. Sub-section (2) of S. 3 of Act XVIII [18] of 1937 says:

"When a Hindu governed by any school of Hindu Law other than the Dayabag school or by customary law dies having at the time of his death an interest in a Hindu joint family property his widow shall, subject to the provisions of sub-s. (3), have in the property the same interest as he himself had."

Sub-section (3) of S. 3 of the same Act says:

"Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided, however, that she shall have the same right of claiming partition as male owner."

[11] On the death of Topandas his widow came to have in the joint family property the same interest as Topandas himself had. The interest of Topandas was undoubtedly a coparcenary interest. Topandas' widow under the Hindu law could not become a coparcener in the joint family, but under the Hindu Women's Rights to Property Act she came to have the same interest in the property as her husband had without being a coparcener. Topandas' interest was by the very nature of a coparcenary interest a fluctuating interest liable to be increased or decreased by death or birth of a coparcener in the family. So long as the widow of Topandas was content to have the same interest in the joint family property as her husband had and did not claim a partition, her interest was just as liable to be increased or decreased as the interest of her husband had he been alive.

[12] Chainomal, a brother of Topandas and Pessumal, died in 1941, but before the institution of the present suit. Now while it is true that when Topandas died in 1937 and his widow came to have in the property the same interest as Topandas had without being a coparcener along with Pessumal and Chainomal, she would have been entitled upon partition to one-third share in the joint family property, if no death or birth had occurred, it is not correct to say that notwithstanding the death of Chainomal, the interest of Topandas' widow remained the same and that she would be entitled upon partition to a one-third share only in the joint family property. Upon this interpretation of S. 3 of Act (XVIII [18] of 1937) we think the learned Judge was right in coming to the conclusion that Topandas' widow was entitled to one-half share in the joint family property upon partition.

[13] In *M. C. Chinniah Chettiar v. Sivagami Achi alias Sornam Achi and others*, (1944) 2 M. L. J. 262: (A. I. R. (32) 1945 Mad. 21) a Division Bench of the Madras High Court had occasion to interpret sub-s. (2) of S. 3, Hindu Women's Rights to Property Act, 1937. In the course of the judgment it referred to the deci-

sion of the Privy Council in *Appovier v. Ramasubba Aiyar*, (1866) 11 M. I. A. 75 : (2 Sar. 218 (PC)) in which their Lordships had observed.*

"During his lifetime the interest of the plaintiff's husband was an uncertain one. His father might have had a son born to him. He could, of course, have fixed his share by insisting on partition, but this he did not do. The section does not give the plaintiff any greater rights than those possessed by her husband, and when she sought partition the joint family had been increased by the adoption of a son by the head of it. The question is fully discussed by the learned author of the tenth edition of Mayne at pp. 721 and 722, and we are in full agreement with the observation made there that a widow cannot be deemed to be in a better position than her husband if he had lived."

[14] In the case before us the position is reversed. In the Madras case there was an increase in the members of the undivided family by the adoption of a son. In this case there was a decrease by the death of Chainomal. It was at first contended by Mr. Manghanmal on behalf of the appellants that while the interest of a widow as representing the interest of her dead husband in the joint family is liable to be diminished by an increase in the members of the undivided family, it is not liable to be augmented by the death of a member. But Mr. Manghanmal abandoned the contention on a closer reading of the Madras case, upon which he had relied. We think that a Hindu widow's interest in her husband's coparcenary estate, is liable to be increased or decreased by the death or birth of a coparcener in the joint family in the same way as if her husband had been alive.

[15] We will now deal with Mr. Manghanmal's attempt to exclude certain items of property from partition.

[16] We have carefully examined the evidence relating to ownership of S. No. 99 and have come to the conclusion that there is no reason for its exclusion from the joint family estate. It was argued that as Chainomal and Pessumal only are entered as owners in the record of rights, Topandas had no interest in this property. But as S. No. 99 was purchased in 1941 after the death of Topandas, absence of Topandas' name in the record of right against this property would not assist the appellants. The learned Judge rightly points out that there is

*There is an obvious error here according to the certified copy received by us. The passage from M.I.A. which is obviously intended to be quoted has been omitted. This passage runs as follows :—

"According to the true notion of an undivided family in Hindu Law, no individual member of the family whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share."

After the above quotation, the words "and proceeded as follows" also have to be understood in order to make the judgment intelligible.—*Ed.*

overwhelming evidence that the three brothers Pessumal, Chainomal and Topandas carried on a joint family business and no evidence was led to show that any of the brothers had a separate income of his own. The learned Judge referred to Ex. 149, a plaint instituted in the Small Cause Court in Suit No. 576 of 1942, on the file of his Court, in which Ramchand and Murli the two sons of Pessumal, had claimed a certain sum from one Sardarimal and had produced as evidence an account which showed that it had continued up to 15th September 1942, only a month before the present suit was instituted. In Suit No. 576 of 1942 Murli and Ramchand had joined the widow of Topandas as a co-defendant. We think the respondents are justified in contending that as recently as 15th September 1942 the sons of Pessumal regarded the business carried on by them as a joint family business in which the widow of Topandas represented her husband's interest. We think there was credible evidence on the record before the learned Judge for coming to the conclusion that S. No. 99 was purchased out of the joint family income and that it was therefore a part of the joint family estate.

[17] As regards the agricultural property shown in Schedule B, S. No. 13/1 in Deh Kanga in Taluka Larkana, it was purchased by Pessumal, in May 1936 when Topandas was alive. There is no evidence that it was purchased by Pessumal out of his separate income and as there was a nucleus in the shape of a business which provided income to the joint family, it is reasonable to suppose that S. No. 13/1 was purchased out of the joint family income and was therefore a part of the joint family estate.

[18] It is true S. No. 13/1 stands in the name of Pessumal, but we are not prepared on the facts of this case to hold that it belonged exclusively to Pessumal. We agree with the learned Judge that it was bought out of the joint family income. In *Rajanagam Ayyar v. Rajanagam Ayyar*, A. I. R. (9) 1922 P. C. 266 : (46 Mad. 373 (P. C.)) their Lordships of the Privy Council have observed:

"The learned Judges of the High Court were, however, perfectly right in the view that the onus was on the defendant to establish that the properties he claimed as the self-acquired properties of his father, Krishna Ayyar, bore that character."

[19] The result is that the appeal is dismissed with costs.

V.B.B.

Appeal dismissed.

A. I. R. (36) 1949 Sind 9 [C.N. 3.]

THADANI AND CONSTANTINE JJ.

*Pessumal Virumal, a firm — Plaintiffs—
Appellants v. Sobhrajmal Ruchandmal —
Defendant 1—Respondent.*

First Appeal No. 48 of 1943, Decided on 17th November 1947, from decision of 1st Class Sub-Judge, Nawabshah, D/- 31st May 1947.

Civil P. C. (1908), O. 23, Rr. 1 and 3 — O. 23, R. 3 applies to mortgage suits — Mortgage suit against several mortgagors — Compromise with some — Decree against them in terms of compromise — Claim against rest cannot be deemed to be given up.

Order 23, R. 3 applies to all suits including suits instituted under the provisions of O. 34, R. 1. Order 23, R. 1 in terms enables a plaintiff to compromise the suit with all or any of the defendants, and R. 3 enables the Court on being satisfied that the compromise has been arrived at by a lawful agreement to pass a decree in its terms. There is, therefore, no warrant for the view that if in a suit instituted under the provisions of O. 34, the mortgagee plaintiff enters into a compromise with one of the mortgagor defendants and a decree is passed against him in terms of the compromise, the result is that the co-mortgagor must be deemed to have been given up. [Para 10]

In such a case, where there is nothing in the terms of the compromise to prevent the mortgagee from proceeding with the suit against the co-mortgagor, he can obtain the usual mortgage decree against him, if the facts of the case warrant such a decree. [Para 11]

Annotation: ('44-Com.) Civil P. C., O. 23, R. 3 N. 4.

Atmaram Harchandrai — for Appellants.

Krishinchand Malkani — for Respondent.

Thadani J. — This is an appeal from the decision of the learned First Class Subordinate Judge, Nawabshah, in suit No. 12 of 1943 in which he dismissed the appellant's suit against the respondent Sobhraj with no order as to costs.

[2] The suit was instituted by the appellant firm against two defendants, the respondent and one Parumal, a brother of the respondent, for the recovery of a sum of Rs. 6642-15-0 due on a mortgage-deed executed by the respondent and Parumal on 6th December 1940 for a sum of Rs. 9330-8-0. Under the terms of the mortgage-deed, the respondent and his brother Parumal had each to pay a sum of Rs. 1000 with interest on 20th Nahri 1997—20th December 1940, and a further sum of Rs. 500 with interest on the 7th of each succeeding Sindhi month: in default of any three instalments the entire amount then due was to become payable at once.

[3] The appellants' case is that a sum of Rs. 3550 was paid by the respondent and his brother Parumal on certain dates specified in para. 5 of the plaint, but that as they had committed default in terms of the bond, the balance of Rs. 5779-8-0 then due with interest and certain other charges incurred by the appellants became payable at once.

[4] The main defence of Parumal was that the appellants had agreed to receive half the

mortgage amount from him and the remaining half from the respondent. It is not necessary to refer to the written statement of the respondent as the suit against him has been disposed of on a preliminary issue raised upon an application made on his behalf. We will refer to this application presently.

[5] On 24th August 1942 the appellants and Parumal entered into a compromise, the terms of which were these :

"1. That defendant 2 do pay to the plaintiffs a sum of Rs. 3160 and half costs in full settlement of his claim half costs of the suit till today and not hereafter. The sum of Rs. 3000 to carry interest at 6 per cent. per annum from the date of suit till payment.

2. The above amount be paid in the following instalments, viz. Rs. 600 (six hundred) every six months, first instalment to commence on 15th February 1943. In case of default of first instalment or any other two, whole amount payable at once.

3. That on payment of the above amount the following properties mortgaged and belonging to defendant 2 shall be deemed to be released : (a) old house shown in the mortgage deed measuring 1800 sq. ft. ; (b) two of the three shops on the western side which have a storey over them.

4. The question of agriculturist is reserved for execution.

5. This will operate as final decree.

6. That the plaintiff shall recover the amount from the mortgaged property, and in case of deficiency from defendant 2 personally."

[6] On 9th September 1942, the learned Subordinate Judge ordered the compromise to be recorded and passed a decree in terms of the compromise against Parumal.

[7] On 18th November 1942, the respondent filed an additional written statement in which he contended that in view of the compromise entered into between the appellants and Parumal, the Court had no jurisdiction to proceed with the case against him, and that, in any case, the claim against him would be reduced to the extent of the amount decreed against Parumal.

[8] On 19th May 1943 an application was made on behalf of the respondent under the provisions of s. 151, Civil P. C., O. 23, R. 3, Civil P. C. and O. 34, R. 1, Civil P. C., inviting the trial Court to dismiss the suit against the respondent. The learned Subordinate Judge accepted the contention of the respondent and dismissed the appellant's claim against the respondent by his order dated 31st May 1943. Against this order the appellant has filed the present appeal.

[9] The learned Subordinate Judge took the view that in a suit instituted under the provisions of O. 34, Civil P. C., there can be only one final decree, and that as a final decree had been passed against Parumal in terms of the compromise, in the eye of the law the respondent must

be deemed to have been given up. The learned Judge then proceeded to say :

"It is true that by this compromise the claim of the plaintiff is reduced from Rs. 6642-15-0 to Rs. 3160 and certain mortgage security is not included in the final decree for sale but, apparently, the remaining property belongs to defendant 1 exclusively and so it is not the subject-matter of Ex. 45. If, however, the plaintiff feels that he has entered into the above compromise in full settlement of his claim through some bona fide mistake on his part, I hope he will not be without any remedy at law. With the present state of the record, I think the claim of the plaintiff against defendant 1 ought to be rejected. The suit against defendant 1 is accordingly dismissed but looking to the circumstances of this case no order is made as to costs."

[10] We think there is no warrant for the learned Judge's view that if in a suit instituted under the provisions of O. 34, Civil P. C., the mortgagee plaintiff enters into a compromise with one of the mortgagor defendants and a decree is passed against him in terms of the compromise, the result is that the co-mortgagor must be deemed to have been given up. It is plain that O. 23, R. 3, Civil P. C., applies to all suits including suits instituted under the provisions of O. 34, R. 1. Order 23, R. 1 in terms enables a plaintiff to compromise the suit with all or any of the defendants, and R. 3 enables the Court on being satisfied that the compromise has been arrived at by a lawful agreement to pass a decree in its terms.

[11] We think there is nothing in the terms of the compromise, Ex. 45, which prevented the appellants from proceeding with the suit against the respondent and obtaining a usual mortgage decree against him, if the facts of the case warranted the passing of a usual mortgage decree. It is common ground that the two properties mentioned in the compromise which were to be returned to Parumal in the event of his satisfying the compromise decree passed against him belonged exclusively to Parumal and the remaining property to the respondent. The fact that the appellants elected to release the two properties to Parumal in the event of his satisfying the compromise decree in no way debarred the Court from passing a usual mortgage decree against the respondent. If and when the question arises as to the execution of final decree against the respondent it may be that the appellants by virtue of their compromise with Parumal would be unable to claim the sale of the two properties belonging to Parumal if Parumal has carried out the terms of the compromise, but that is a matter for the Court executing the final decree.

[12] We are informed that no final decree has been drawn up against Parumal in terms of the compromise. Be that as it may, the compromise decree passed against Parumal is no

impediment to the passing of a usual mortgage decree against the respondent if the appellants succeed in their claim against him. Questions relating to execution, discharge or satisfaction, arising out of the compromise decree passed against Parumal and a mortgage decree that may be passed against the respondent will be determined with reference to S. 47, Civil P. C., and we can see no difficulty in the way of the Court giving effect to the compromise decree passed against Parumal and a mortgage decree against the respondent if one should be passed against him.

[13] We would accordingly set aside the judgment and decree of the trial Court and remand the case to the trial Court with a direction to re-admit the suit under its original number in the register of civil suits and proceed to determine the suit against the respondent. The costs of this appeal will be costs in the cause.

V.B.B.

Case remanded.

A. I. R. (36) 1949 Sind 10 [C. N. 4.]

THADANI AND CONSTANTINE JJ.

The Province of Sind — Appellant v. Mt. Javat Khatun w/o Mahomed Abbas and others — Respondents.

Second Appeal No. 19 of 1943, Decided on 5th December 1947, from decision of learned Dist. Judge, Nawabshah, D/- 10th April 1943.

Bombay Land Revenue Code (V [5] of 1879), S. 37 (3) — Order of Revenue Commissioner in second appeal from appellate order of Collector — Proceedings before Revenue Tribunal from order of Revenue Commissioner — Suit in civil Court beyond one year from order of Revenue Commissioner is barred under S. 37 (3).

The Revenue Commissioner gave a decision on appeal under S. 203 from the appellate order of the Collector on 4th August 1938. Against that order of the Revenue Commissioner, the Government of Sind was moved, which referred the matter to the Revenue Tribunal for decision. The Tribunal treated the application as a revision application and rejected it in November 1939. The applicant filed a suit in Civil Court in August 1940 for a declaration and injunction.

Held that for the purposes of limitation prescribed by S. 37 (3), the order which was to be taken into consideration was the order of 4th August 1938. The suit having been filed more than one year from the date of that order was time-barred. [Para 12]

Balkrishna H. Lulla — for Appellant.

Keshowdas Dalpatrai — for Respondents.

Thadani J. — This is an appeal from the decision of the learned District Judge of Nawabshah in which he affirmed the judgment and decree of the Subordinate Judge of Hyderabad in Suit No. 58 of 1940, in which the Subordinate Judge had decreed the suit with costs.

[2] The suit was instituted by one Muhammad Abbas against the Province of Sind for a declaration and injunction valued at Rs. 200 in respect

of a plot of land with buildings thereon measuring some 3052 sq. feet situated in the village of Khan Kirio in Taluka Naushahro Feroze. At the date of the institution of the second appeal in this Court, Muhammad Abbas was dead and his legal representatives have been brought on the record as respondents.

[3] The case of Muhammad Abbas was that he was the owner in possession of the property in suit by virtue of an exchange-deed dated 4th April 1934, some time later he built a few shops on the vacant plot to which the Banias of the adjoining village of Chatugarh objected and petitioned the Revenue Authorities alleging that there was a well on this plot which was used by the public. The Deputy Collector of Naushahro made an enquiry into the allegations of the Banias and by his order dated 18th January 1937 negatived their contention. The Banias appealed to the Collector of Nawabshah, who, on 16th June 1937, affirmed the order of the Deputy Collector. On 4th August 1938, however, the Revenue Commissioner in Sind set aside the order of the Collector of Nawabshah dated 16th June 1937 and held that the plot in suit should remain a "Public *Khad*." Against the order of the Revenue Commissioner, Muhammad Abbas moved the Government of Sind which referred the matter to the Revenue Tribunal for decision. The Tribunal treated Md. Abbas' application as a revision application and rejected his claim. Md. Abbas then filed the present suit against the Province of Sind for a declaration and injunction.

[4] The Province of Sind raised a number of defences, one of them being that the suit was barred by limitation by reason of the provisions of S. 37 (3), Land Revenue Code, and Art. 14, Limitation Act.

[5] On the issue of limitation both the trial Court and the first Appellate Court came to the conclusion that the suit was not barred by limitation, but for different reasons.

[6] Mr. Lulla for the Province of Sind contends that the present suit should have been filed within a year of the order of the Revenue Commissioner dated 4th August 1938, having regard to the provisions of S. 37 (3), Land Revenue Code, and that as the suit was filed on 13th August 1940, it was time-barred.

[7] On the issue of limitation, the learned Subordinate Judge directed himself to the following question, 'whether the Revenue Authorities have power to decide the question as to the ownership of the plot under S. 37, Land Revenue Code', and answered the question in the negative on the authority of certain decisions in *Secretary of State for India in Council v. Mushtaksing and others* (1918) 7 S. L. R. 169 :

(24 I. C. 813), *H. H. Sir Agha Sultan Mahmood Shah Agha Alisha v. Secretary of State for India in Council*, (1914) 8 S. L. R. 331 : (A. I. R. (1) 1914 Sind 119), and *Malkajappa Madivalappa Bulla v. Secretary of State for India in Council*, (1911) 36 Bom. 325 : (15 I. C. 517). But it is plain that these decisions were given in cases which arose before 1912 when S. 37, Land Revenue Code, was amended by the addition of sub-sections (2) and (3). It is equally plain that the addition of sub-section (2) to S. 37 in 1912, under which the order in the present case was manifestly made, rendered the decisions upon which the learned Subordinate Judge relied quite inapplicable. The learned Subordinate Judge took the view that the order of the Revenue Commissioner was not an act done in his official capacity so as to attract the provisions of Art. 14, Limitation Act or S. 37, Land Revenue Code.

[8] Sub-sections (2) and (3) of S. 37 read as follows :

"(2) Where any property or any right in or over any property is claimed by or on behalf of the Crown or by any person as against the Crown, it shall be lawful for the Collector or a survey officer, after formal inquiry of which due notice has been given, to pass an order deciding the claim.

(3) Any suit instituted in any Civil Court after the expiration of one year from the date of any order passed under sub-section (1) or sub-section (2), or, if one or more appeals have been made against such order within the period of limitation, then from the date of any order passed by the final appellate authority, as determined according to S. 204, shall be dismissed (although limitation has not been set up as a defence) if the suit is brought to set aside such order or if the relief claimed is inconsistent with such order, provided that in the case of an order under sub-section (2) the plaintiff has had due notice of such order."

It is clear from the facts of this case that when the Banias of Chhatugarh petitioned to the Deputy Collector complaining against the encroachment of Muhammad Abbas, the Deputy Collector took action under sub-s. (2) of S. 37, after complying with the formalities prescribed by that section. The notice, Ex. 37, confirming the title of Muhammad Abbas to the property in suit reminds Muhammad Abbas that a notice under R. 29 (1) of the Rules framed under the Bombay Land Revenue Code was issued to him. The order of the Deputy Collector was therefore an order made in pursuance of S. 37 (2), and although it was confirmed in appeal, by the Collector, the Revenue Commissioner by his order dated 4th August 1938, held that the property was a public *khad*, that is to say, Government property.

[9] We have, then, an order passed by the Revenue Commissioner dated 4th August 1938, in second appeal from an appeal made to the Collector, and a suit instituted in any civil Court

after the expiration of one year from 4th August 1938, shall be dismissed by reason of S. 37 (3).

[10] Chapter XIII of the Bombay Land Revenue Code containing Ss. 203 and 204 relates to appeals and revision. For the purposes of sub-s. (3) of S. 37, the question of revision is irrelevant. Under S. 203, Bombay Land Revenue Code :

"In the absence of any express provision of this Act, or of any law for the time being in force to the contrary an appeal shall lie from any decision or order passed by a revenue officer under this Act, or any other law for the time being in force, to that officer's immediate superior, whether such decision or order may itself have been passed on appeal from a subordinate officer's decision or order or not."

[11] Under S. 204, Bombay Land Revenue Code:

"An appeal shall lie to the Provincial Government from any decision or order passed by a Commissioner or by a Survey Commissioner, except in the case of any decision or order passed by such officer on appeal from a decision or order itself recorded in appeal by any officer subordinate to him".

[12] There was, therefore, no further appeal from the decision of the Revenue Commissioner as the Revenue Commissioner himself gave a decision on appeal from the appellate order of the Collector. For the purposes of limitation prescribed by S. 37 (3), Bombay Land Revenue Code, the order which is to be taken into consideration in this case is the order of 4th August 1938. The present suit having been filed in 1940 was clearly time-barred, and it must be dismissed under sub-s. (3) of S. 37, Bombay Land Revenue Code.

[13] It was contended by the respondents that under S. 11, Bombay Revenue Jurisdiction Act of 1876, which says that:

"No Civil Court shall entertain any suit against the Crown on account of any act or omission of any revenue officer unless the plaintiff first proves that, previously to bringing his suit, he has presented all such appeals allowed by the law for the time being in force, as, within the period of limitation allowed for bringing such suit, it was possible to present", the word "appeals" must be deemed to include proceedings before the Revenue Tribunal in this case, and as the proceedings before the Tribunal ended in November 1939, the present suit filed in August 1940 was not liable to be dismissed. The respondents' advocate, has not cited any authority in support of his contention, and we are unable to give effect to it.

[14] The learned District Judge did not dispose of the question of limitation arising out of sub-s. (3) of S. 37, Land Revenue Code, in the manner in which the Subordinate Judge had dealt with it. It is to be remarked that although in the memorandum of appeal to the District Court there was a reference to S. 37 (3), Land Revenue Code, the learned District Judge in his judgment says that the Government Pleader urged that the suit was brought under Art.

14, Limitation Act, and the learned District Judge then proceeded to deal with the issue of limitation with reference to Art. 14, Limitation Act. The learned District Judge took the view that the provisions of sub-s. (2) of S. 37, Land Revenue Code, were not strictly complied with, and that the suit, therefore, was not time-barred. As we have stated in the earlier part of our judgment, the order of the Deputy Collector was clearly made in pursuance of sub-s. (2) of S. 37, after complying with all the formalities, and sub-s. (3) expressly refers to an order passed under sub-s. (2). As an appeal to the Revenue Commissioner was made under the provisions of S. 203, the suit should have been filed within one year of the date of the order of the Revenue Commissioner, and as it was not so filed, the suit should have been dismissed.

[15] Accordingly we set aside the judgment and decree of the first appellate Court and dismiss the suit with costs throughout. We allow this appeal with costs on the respondents.

V.B.B.

Appeal allowed.

A. I. R. (36) 1949 Sind 12 [C. N. 5.]

THADANI AND CONSTANTINE JJ.

Aboobucker s/o Shakhi Mahomed Laloo and others — Appellants v. Sahibkhatoon and others — Respondents.

First Appeal No. 24 of 1943, Decided on 16th October 1947, from judgment and decree of Lobo J., in Suit No. 294 of 1939.

(a) Limitation Act (1908), Art. 144 — Original adverse possession does not cease to be so, on possessor's becoming co-sharer, if he continues to assert hostile title.

Original adverse possession is not interrupted by the possessor's subsequently becoming a co-owner, if he continues to assert hostile title and exercise possession to the exclusion of other co-sharers : A. I. R. (6) 1919 P. C. 44, *Foll.*; A. I. R. (27) 1940 Mad. 102 ; A. I. R. (11) 1924 Cal. 118; A. I. R. (23) 1936 Lah. 994 and A. I. R. (29) 1942 Mad. 106, *Disting.*

[Paras 17 and 18]

Annotation : ('42-Com.) Limitation Act, Arts. 142 and 144 N. 35 and 64.

(b) Limitation Act (1908), Art. 144 — Possession obtained under mistake of law can still be adverse.

Possession obtained under mistake of law of the persons entitled can be adverse to them : 28 Bom. 87, *Rel. on.* [Para 21]

Annotation : ('42-Com.) Limitation Act, Arts. 142 and 144 N. 52b.

(c) Civil P. C. (1908), O. 6, R. 2 — Pleadings and proof — Hostile title pleaded and evidence led — Adverse possession need not be pleaded in issues — Limitation Act (1908), Art. 144.

Where a plaintiff alleges hostile title and leads evidence of possession for the statutory period which, if accepted, would extinguish the title of a true owner, it is not necessary for him to plead in terms adverse possession, for whether such possession is adverse or not is a question of evidence and not a matter of plead-

ing : A. I. R. (34) 1947 P C 15 ; A. I. R. (7) 1920 Cal. 800 and A. I. R. (5) 1918 Sind 13, *Disting.*

[Paras 26 & 28]

Annotation : ('44-Com.) Civil P. C., O. 6 R. 2, N. 2 & 9; ('42-Com.) Limitation Act, Arts. 142 and 144, N. 97.

(d) Evidence Act (1872), Ss. 32 and 33—S. 32 is not controlled by S. 33 : 32 Cal. 6 and A. I. R. (28) 1941 Rang. 301, *Rel. on.* [Para 30]

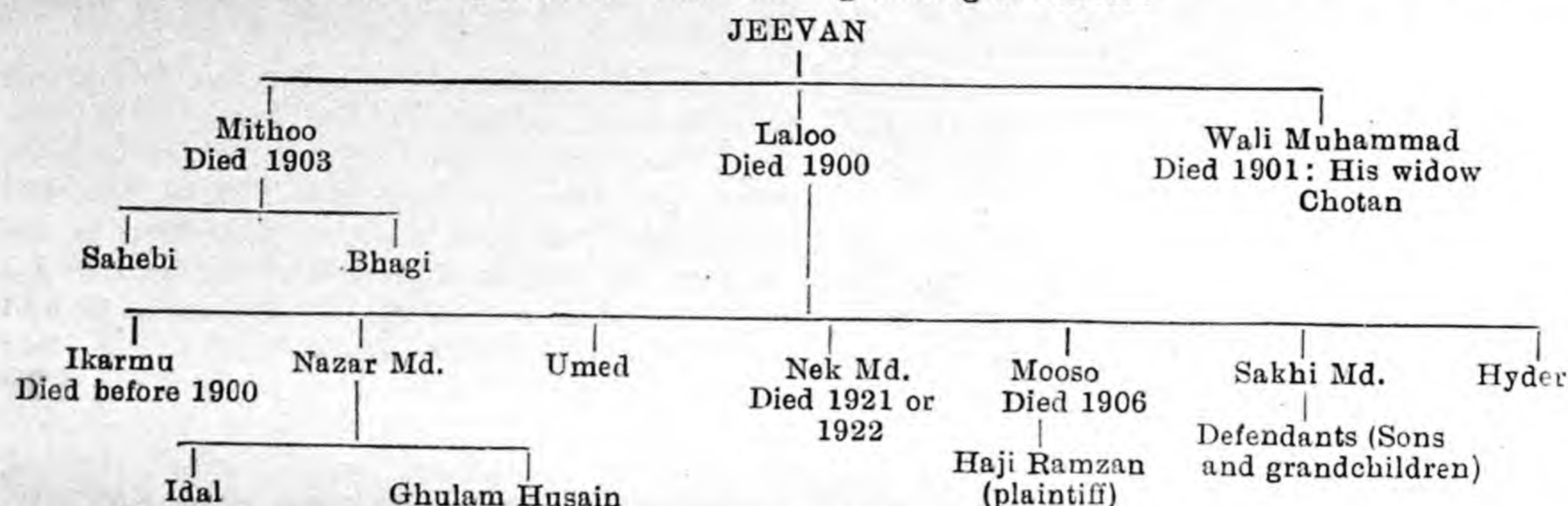
Annotation : ('46-Man.) Evidence Act, S. 32, N. 1 & 34.

Srikrishindas H. Lulla—for Appellants.

Dingomal Narainsing—for Respondents.

Thadani J.—This is an appeal from the decision of Lobo J. in Suit No. 294 of 1939, in which he decreed the plaintiff-respondents' suit for

possession of the property in suit with costs and mesne profits from the date of suit. The property involved in the suit is Survey No. 26, Survey Sheet L. R. 7 situated in the Lawrance Quat, Karachi. Suit was instituted by one Haji Ramzan son of Mooso on 24th November 1939. Three weeks later, on 18th December 1939, Haji Ramzan died and his heirs and legal representatives were brought on the record. The defendants in the suit are the heirs and legal representatives of one Sakhi Muhammad, son of Laloo, a paternal uncle of Haji Ramzan. Sakhi Muhammad Laloo died in 1931. The relationship of the parties is shown in the following genealogical table:



[2] The case of Haji Ramzan was that he was the owner of the property in suit having inherited it from his father Mooso Wali Muhammad, who died in 1906, and that he was in possession of the property in suit since 1906 and he collected and enjoyed the rents and profits of the property, and paid all the Government and municipal dues.

[3] Haji Ramzan alleged that Sakhi Mahomed died in 1931 in very poor circumstances and left a large family without adequate means for its support; out of pity for the widow of Sakhi Mahomed (defendant 6), he permitted her to collect rents of certain huts standing on the property for maintaining herself and her children. Defendants 1 and 2 are the sons of Sakhi Mahomed by his first wife. Defendants 3 to 5 are the sons of defendant 6. Defendant 2 died during the pendency of the suit and his heirs and legal representatives were brought on the record as defendants 2 (a) to (i).

[4] The defence to the suit was that Haji Ramzan was not the owner of the property in suit, and had no right to file the suit, that Sakhi Mahomed during his lifetime had acquired title to the property in suit by adverse possession; after his death in 1931 the defendant-appellants became the owners.

[5] On the pleadings, some 13 issues were framed, but the decision of the suit rests on the

findings on the following two issues : (1) Was plaintiff Haji Ramzan the owner of the plot in suit? (2) Has the said plot remained in the possession and enjoyment of the said plaintiff as alleged in para. 3 of the plaint?

[6] For a correct appreciation of the evidence in this case, it is necessary to refer to a custom of adoption prevailing in the Marwari Silawata Community, to which the parties belong. The remote ancestors of the parties were originally Hindus, and resided in Jesulmere in the Rajputana State. They were converted to Islam some 200 years ago, and after the conquest of Sind in 1842 some of the converts migrated to Karachi and other places in Sind, and retained many Hindu customs and usages including the custom of adoption.

[7] At this stage it is convenient to refer to the case of *Usman s/o Imambux v. Assat w/o Jumo*, (1923) 18 S. L. R. 149 : (A. I. R. (12) 1925 Sind 207), filed in 1913 in the then Court of the Judicial Commissioner of Sind, in which the appellate Court finally dispelled the mistaken belief prevailing in the Marwari Silawata Community of Karachi that the custom of adoption was a valid custom. The two issues decided by the appellate Court in *Usman Imambux v. Assat w/o Jumo* : 18 S. L. R. 149 : (A. I. R. (12) 1925 Sind 207), were (1) Whether there is a custom of adoption having the force of law among

the Marwari Silawata Community in derogation of the ordinary rules of Mahomedan law and (2) whether there is a custom excluding women from inheritance and restricting widows to maintenance and inheritance having the force of law among the Marwari Silawata Community in derogation of the ordinary rules of Mahomedan law? The appellate Court answered these issues in the negative affirming the findings of the trial Judge.

[8] We have referred to the decision of the appellate Court in *Usman Imambux v. Assat w/o Jumo*, 18 S. L. R. 149: (A.I.R. (12) 1925 Sind 207) with a view to emphasising the fact that, until 1916 at any rate, when Hayward A. J. C. gave a decision against the validity of the custom of adoption, the members of the Marwari Silawata Community recognised the custom of adoption as a valid custom, and permitted property inherited by an adopted son to be treated by him as his sole property.

[9] The ancestor of the parties to the present suit was one Jeevan who died before 1900. He left three sons, Mithoo, Wali Mohamed and Laloo. Laloo died on 24th June 1900. He left seven sons Karmu, Nazar Mahomed, Umed, Nek Mahomed, Mooso, Sakhi Mahomed and Hyder and two daughters. Karmu died during the lifetime of his father Laloo. Haji Ramzan who instituted the present suit was the son of Mooso. Wali Mohamed died in 1901, leaving a widow called Chotan. Wali Mohamed left five immovable properties situated in Karachi including the property in suit, and the learned Judge in his judgment at line 232 says: "It is not denied that Mooso took possession of them and looked after and managed them till his death in 1906."

[10] After the death of Mooso in 1906, his son Haji Ramzan being the minor, Chotan the widow of Wali Mohamed looked after and managed the property in suit until 1910 when she went on a pilgrimage to Mecca. In her absence Nek Mohamed, one of the sons of Laloo managed the properties for the benefit of the minor Haji Ramzan. In 1910 Haji Ramzan was about 7 years old. Chotan died while she was abroad.

[11] Mithoo, the third son of Jiwan, died in 1903 leaving two daughters, Sahibi and Bhaghi. It appears that in 1902, Mithoo made a will. Before his death he had adopted Nazar Mohamed, another son of Laloo. The adoption of Mooso by Wali Mohamed and the adoption of Nazar Mohamed by Mithoo are referred to in an application for mutation of names made in 1929 by Umed, Sakhi Mohamed and Hyder, three sons of Laloo. It is significant that the properties mentioned in the will of Laloo are only his self-acquired properties, and the will contains the statement that only four of the surviving sons

of Laloo were interested therein, Karim having died during Laloo's lifetime, Nazar Mohamed having been adopted by Mithoo, and Mooso by Wali Mohamed.

[12] Nek Mohamed who was looking after the property in suit from 1910 died in 1921 or 1922. Sakhi Mohamed died in 1931. It is common ground that but for the adoption of Mooso by Wali Mohamed $\frac{3}{4}$ ths of the property in suit, upon Wali Mohamed's death, would have devolved on Mithoo and the remaining $\frac{1}{4}$ th on Chotan, Wali Mohamed's widow. It is also common ground that but for the adoption of Mooso by Wali Mohamed, Mooso as the natural son of Laloo could have become a cosharer in the property in suit upon the death of Mithoo in 1903.

[13] Haji Ramzan's case in the plaint was that his father Mooso was the owner of the property, and that on his death in 1906, he became the owner; that his father Mooso, until 1906, and he himself, after 1906, were in possession of the property in suit in their own right and to the exclusion of all the heirs of Wali Mohamed and the brothers of Mooso. Haji Ramzan, in other words, asserted exclusive title derived from his father Mooso and claimed to be in possession of the property in suit until shortly before the suit, Mooso having been in possession of the property, from 1901 to 1906.

[14] The learned trial Judge has found that the possession of Mooso in 1901 of the property in suit, coupled with assertion of an hostile title by virtue of his adoption, was adverse to Chotan and Mithoo in 1901, and that as Mooso continued to remain in possession of the property in suit from 1901 to 1906, asserting his hostile title, his adverse possession was not arrested by reason merely of the fact that in 1903, upon the death of Mithoo, Mooso became a co-sharer of the property. The learned Judge has also found that from 1906 to 1937 or 1938, Haji Ramzan after the death of Mooso asserted hostile title and remained in possession of the property through his adoptive mother Chotan from 1906 to 1910, and from 1910 until he attained majority in 1922 or 1923, he asserted hostile title to and was in possession of the property through his paternal uncle Nek Md., and after 1922 or 1923 Haji Ramzan was in possession of the property personally continuing to assert his hostile title. Whether Mooso's hostile title was well founded or not is for the purposes of a decision in this case wholly immaterial. The learned Judge has found that the assertion of the hostile title by Mooso from 1901-1906 was not challenged by anybody. Indeed, Mithoo in his will made in 1902, a year after Wali Md.'s death, did not treat any of the properties left by Wali Md. as his own. On the

contrary, he recognised Mooso's adoption by Wali Md. as a valid adoption; Mithoo himself by his will in 1902 adopted Nazar Md.

[15] Mr. Lulla for the appellants contends that assuming Mooso took possession of Wali Md.'s properties in 1901 asserting an hostile title by virtue of the alleged adoption, nevertheless in 1903, upon the death of Mithoo, the earlier possession of Mooso was merged into possession of a cosharer. Now it may be conceded that if Mooso had not taken possession of the property in suit in 1901, in pursuance of the alleged adoption, his possession of the property in suit in 1903 upon the death of Mithoo, would have been the possession of a cosharer. But it had been found by the learned Judge, a finding with which we agree, that Mooso was in possession of the property in suit in 1901, asserting his hostile title. The question for consideration is whether this adverse possession of Mooso which began in 1901, became in fact, not as a matter of law, a cosharer's possession in 1903 upon the death of Mithoo. The finding of the learned trial Judge is in effect that Mooso's possession of the property in suit up to 1906 when he died was not the possession of a cosharer, and that after the death of Mooso, the possession of Haji Ramzan continued to be adverse and not that of a cosharer.

[16] Mr. Lulla, however, contends that under the personal law applicable to the parties, if adverse possession is succeeded by a cosharer's possession in the same property the first possession is automatically interrupted by reason of the succession and the possession then becomes a cosharer's possession. In support of this contention, Mr. Lulla has relied upon the case of *T. Srinivasa Rao and another v. Annandhanam Seshacharu and another* (1941) 198 I. C. (Mad). 169 : (A.I.R. (29) 1942 Mad. 106). In the case the argument based upon proved or admitted facts was this : Long before succession had opened, the property was gifted by one Janakibai to defendant 1 in that suit, and from the date of gift, defendant 1 was dealing with the property in her own right, and when Janakibai died defendant 1 did not take the property as her heir but continued to hold it adversely to the estate, and as no suit had been filed within twelve years from the date of suit, she acquired title thereto by adverse possession after the lapse of twelve years. This argument was sought to be supported by the decision of the Privy Council in *Varada Pillai v. Jeevaratnammal*, (1919) 43 Mad. 244 : (A. I. R. (6) 1919 P. C. 44), and a decision of the Madras High Court in *Alagiri Chetty v. Muthusami Chetty*, A. I. R. (27) 1940 Mad. 102 : (187 I. C. 376). Venkataramana Rao J., however, did not accept the argument and observed :

"On the death of Janakibai the property vested in defendant 1 by right of inheritance. Under the Hindu law, succession cannot remain in abeyance and whether the heir at law wills or not the property will vest in him. Before the title to the suit property was perfected by adverse possession by defendant 1, the property vested in her. The legal consequence of that vesting is that adverse possession which was running against the owner came to an end. Defendant 1 became the owner and adverse possession could not run against herself."

Venkataramana Rao J. then proceeded to distinguish the case of *Varada Pillai v. Jeevaratnammal* (1919) 43 Mad. 244 : (A. I. R. (6) 1919 P. C. 44).

[17] We do not think the salient fact before us can be distinguished from the salient fact present in the case of *Varada Pillai v. Jeevaratnammal* (43 Mad. 244 : A. I. R. (6) 1919 P. C. 44). Here it is plain that during the lifetime of Mithoo, Mooso's possession was adverse not only to Mithoo but also to Chotan, the widow of Wali Md. There is no reason to suppose that when on the death of Mithoo in 1903 Mooso became entitled to a share in the property, the character of his possession from 1901-1903 with regard to the one-fourth share of Chotan or the three-fourths share of Mithoo was changed; and as the possession of Mooso from 1901 was adverse to Mithoo and Chotan, the mere fact that upon the death of Mithoo, Mooso became a cosharer with the heirs of Mithoo and Laloo is not sufficient to interrupt the original adverse possession if, in fact, as we hold, Mooso continued to assert his hostile title. We think the law laid down in *Varada Pillai v. Jeevaratnammal* (1919) 43 Mad. 244 : (A. I. R. (6) 1919 P. C. 44) is applicable to the facts before us.

[18] In *Panraj Mohan Rai and others v. Bipin Behari Chakladar and others*, A. I. R. (11) 1924 Cal. 118 : (76 I.C. 511), the legal position arising out of entry and assertion of hostile title was stated in these terms :

"The possession of a person who enters into possession originally as co-owner can be adverse if there be an ouster of the other co-owners. If so, the possession of a person who originally entered not as a co-owner, but subsequently became a proprietor and continued to assert hostile title and exercise possession to the exclusion of the other co-owners cannot be said to have ceased to be adverse."

At p. 122, the learned Judge observed :

"With regard to the second ground it is no doubt true that the possession of a co-owner is not ordinarily adverse to the other co-owners, and Bhriugu's possession after he became a co-owner would not have been adverse, were it not for the fact that he continued to hold the land after he became a co-owner in the assertion of the same hostile title as he had set up before he became a co-owner."

[19] In *Ude Singh and another v. Chittar and others*, A. I. R. (23) 1936 Lah. 994 : (167 I. C. 473), Jai Lal J. on appeal from the decision of a District Judge who had held that the descendants

of one Kishanchand were not solely entitled to the estate of Mt. Barwalo, that they had not established title by adverse possession, formulated the question for his decision in these terms :

Whether the descendants of Kishen Chand have been holding the land in dispute adversely to the descendant of Ram Saran and Bishen Chand for more than twelve years ? "

The learned Judge held :

"Assuming that the possession of the descendants of Kishen Chand during the lifetime of Mt. Barwalo was with her permission—a matter on which there is considerable doubt and which I refrain from deciding—it is obvious that when Mt. Barwalo died in 1906 the descendants of Ram Saran, Bishen Chand and Kishen Chand respectively became entitled in equal shares to the property left by her. The descendants of Kishen Chand were already in possession of the entire property. It cannot therefore be asserted that from the date of the death of Mt. Barwalo they held the property as co-sharers on behalf of Ram Saran and Bishen Chand. It is not even alleged, much less proved, that Ram Saran and Bishen Chand ever permitted them to keep in their possession their respective shares. The position in 1906 was this, that though the property was in actual possession of Kishen Chand's descendants, the descendants of Ram Saran and Bishen Chand also were entitled to share in it, but it cannot be said that Kishen Chand's heirs held the property as co-sharers on behalf of the descendants of Ram Saran and Bishen Chand. The rule, therefore, that possession of one co-sharer must be deemed to be permissive and on behalf of the other co-sharers, has no application to the facts of this case. The case appears to be analogous to possession by one heir of a deceased Muhammad, who has died leaving a number of heirs; in such a case the possession of the heir, who is in possession of the property of the deceased, cannot be held to be in a representative capacity but must be deemed to be in his own right and the other heirs must come to Court within the prescribed time in order to succeed in getting possession of their shares. They cannot succeed merely by alleging that one heir, who is in possession of the estate, was in such possession in a representative capacity, they must prove the representative nature of possession."

[20] This, we think, is in conformity with the decision of the Privy Council in *Varada Pillai v. Jeevaratnammal*, (1919) 43 Mad. 244: (A. I. R. (6) 1919 P. C. 44) and of the Division Bench of the Calcutta High Court in *Pankaj Mohan Rai and others v. Bipin Behari Chakladar and others*, A. I. R. (11) 1924 Cal. 118 : (76 I. C. 511).

[21] It was next argued by Mr. Lulla that a mistake of law made by Chotan and Mithoo in the matter of succession to the estate of Wali Mohamed in 1901, and thereafter the same mistake of law repeated by the sons of Laloo on the death of Mithoo in 1903 would not permit possession of Mooso in 1901 to run adversely against Mithoo and Chotan in the first instance, and thereafter to run adversely against the sons of Laloo on the death of Mithoo in 1903. This argument was considered by Sir Lawrence Jenkins C. J. in *Purshotam Krishnaji v. Sagaji Malji & Co.*, (1903) 5 Bom. L. R. 674 : (28 Bom. 87) in which he observed (p. 676):

"Durgan's mortgage was voidable in the absence of justifying circumstances, and as between Godaji and the plaintiffs it was treated as having come to an end, so that for the future Godaji held the property as mortgagee from the plaintiffs and his possession must be attributed to a right derived from them; for, it has been found as a fact that Rau was aware of what was being done and acquiesced in it. Though, therefore, Godaji's possession in its inception was not by virtue of a right derived from the plaintiffs, still, on the facts found, his possession was from 22nd June 1882 under colour of a right derived from the plaintiffs and so adverse to Rau and that to her knowledge. It may be that Godaji thus took possession under a mistake common to all as to Rau's rights but that did not make the possession any the less adverse to Rau : *Cholmondely v. K. Clinton*, (1820) 4 Bing. 10.

Any title that Rau may have had, thus became extinguished and as against the mortgagee Godaji, and anyone claiming under him the right to redeem the property is in the plaintiffs. The decree of the lower appellate Court must, therefore, be confirmed with costs."

We wish to emphasise the observation of Jenkins C. J. : "for it has been found as a fact that Rau was aware of what was being done and acquiesced in it," as it has a direct bearing on the facts of this case.

[22] The learned trial Judge has found as a fact that Mithoo and Chotan knew what was being done by Mooso on the death of Wali Mohamed and acquiesced in it and upon the death of Mithoo in 1903 the two daughters of Mithoo and the heirs of Laloo knew that Mooso in 1901 had taken possession of the property in suit asserting an hostile title and like Mithoo and Chotan acquiesced in it.

[23] When Mr. Lulla realised the significance of the finding of Lobo J. in this behalf, he endeavoured to argue that the evidence does not establish that Mooso ever took possession of the property in suit on the death of Wali Mohamed in 1901, that the evidence does not establish the fact that after the death of Mooso in 1906 Chotan took possession of the property and was in possession till 1910, or that from 1910 to 1922 or 1923 the property was in possession of Nek Mohamed for the benefit of Haji Ramzan, who was until 1922 or 1923 a minor. Mr. Lulla attempted to argue that the evidence on the contrary shows that Sakhi Mohamed, a brother of Mooso, was in possession of the property in suit from 1901 to to 1931 in his own right.

[24] We have carefully examined the evidence in the case and have come to the conclusion that the learned Judge's appreciation of the evidence is amply justified and that Mr. Lulla's contention is not supported by the evidence on the record.

[25] With regard to the evidence which has been taken into consideration by the learned Judge on the question of adverse possession by Haji Ramzan, it was contended by Mr. Lulla that as Haji Ramzan failed to establish his title,

there being no plea of adverse possession raised in the plaint, no amount of evidence led in the case could have been considered by the learned Judge. In support of his contention, Mr. Lulla has relied upon the decision of the Court of the Judicial Commissioner of Sind in *Ramchand Gurdasmal and another v. Gobindram Gurdasmal*, (1919) 18 S. L. R. 75 : (A. I. R. (5) 1918 Sind 13). But from the judgment of Fawcett A. J. C. it is clear that the learned Judge there was dealing with a case which has no bearing on the facts before us. Fawcett A. J. C. referred to the case of *Eshenchunder Sing v. Shamachurn Bhutto*, (1866) 11 M. I. A. 7: (6 W. R. 57 P. O.), in which their Lordships of the Privy Council had observed that :

"the determination in a cause should be founded upon a case either to be found in the pleadings, or involved in, or consistent with, the case thereby made."

and that

"the state of facts, and the equities and ground of relief originally alleged and pleaded by the plaintiff, are not to be departed from."

[26] In the case before us, Haji Ramzan pleaded title which was manifestly hostile to the title of Chotan and Mithoo in the first instance, and asserted that his father Mooso was in possession of the property in suit in pursuance of the hostile title. We think that where a plaintiff alleges hostile title and leads evidence of possession for the statutory period which, if accepted, would extinguish the title of a true owner, it is not necessary for him to plead in terms adverse possession, for, whether such possession is adverse or not is a question of evidence and not a matter of pleading. This view, we think, is supported by a very recent decision of their Lordships of the Privy Council in *Munnalal, minor and others v. Mt. Kashibai and others*, (1946) 2 M. L. J. 453 : (A. I. R. (34) 1947 P. C. 15) in which Sir John Beaumont observed at page 456 :

"Their Lordships, however, think that there is no room for drawing any presumption in this case since the circumstances under which the possession was assumed are known. Jankibai, on the death of her father, took possession under a claim of title derived under her father's will. She failed to satisfy the Revenue Authorities as to her title, but they accepted the fact that she was in possession and entered her name as occupier. There is nothing to show that she ever withdrew her claim to title under the will of Bahadur and that claim was plainly adverse to the title of Balwant. If, after the death of Bahadur, the rights of the parties had been determined in a civil suit, it might have been held that Bahadur possessed an interest, whether as co-sharer or occupancy tenant, which he could dispose of by will or it might have been held, as the appellant contends that it would have been, that Jankibai succeeded as heir to her father for the limited interest of a female; but as Bahadur's interest was not the subject of any written grant, it is obvious that Jankibai might have failed to prove that she had inherited any interest in the property, in which case her possession would have been unlawful from its

inception. It is useless to speculate on what might have been the result of litigation which neither party ventured to embark upon. The essential fact is that Jankibai and her successors remained in possession of the property for some 40 years prior to the institution of the suit and that they took possession under a claim of right adverse to the title of the appellant. In their Lordships' opinion, in these circumstances, the claim in the second suit is barred under Art. 144, Limitation Act."

[27] In *Kassim Hassan v. Hazara Begum*, (1920) 92 Cal. L. J. 151 : (A.I.R. (7) 1920 Cal. 800), the argument addressed to us by Mr. Lulla that when a plaintiff fails to establish his title which he pleads, he must plead adverse possession in the plaint before a Court will look at the evidence of adverse possession led in the case was dealt with by Mookerjee A. C. J. in these terms (p. 165).

"It has next been argued that the plaintiff should not be allowed to succeed on the basis of prescriptive title to the office of mutwalli when such a case was not expressly made in the plaint. There is clearly no substance in this contention. The relevant facts were carefully set out in the plaint and the plaintiff asked for a declaration, not that she was mutwalli by appointment or by hereditary succession, but that on the facts stated the defendant was in wrongful possession and should consequently be ordered to deliver up quiet and peaceful possession to her. There is no room for suggestion that the defendant has been taken by surprise and he has thus no foundation for a grievance. As ruled by this Court in *Sunduri v. Mudhu Chunder*, (1887) 14 Cal. 592, a plaintiff may be allowed to succeed on a title by adverse possession, pleaded even for the first time in the Court of appeal, provided such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. It was pointed out in the case of *Ram Chandra v. Ramanmani*, (1916) 20 C. W. N. 773, 785 : (A. I. R. (4) 1917 Cal. 469), that this view is supported by a dictum of Lord Davey in *Vasudeva v. Maguni*, (1901) 24 Mad. 387: (28 I. A. 81 P. C.), though the contrary opinion has sometimes been maintained. The same rule was adopted in the cases of *Nepanbala v. Sitikanta*, (1910) 15 C. W. N. 158 : (8 I. C. 41) and *Lilabati v. Bishun*, (1907) 6 Cal. L. J. 621. We hold accordingly that at the time of institution of this suit, the office of mutwalli was legally vested in the plaintiff and on that basis she was entitled to possession of the trust estate."

[28] In the case before us, the facts constituting adverse possession have been sufficiently set out in the plaint, and the absence of the word "adverse" in the plaint has no significance. Whether possession is adverse possession is a question of fact to be decided on the evidence led in the case.

[29] We will now proceed to examine the contention of Mr. Lulla that there is no evidence that Mooso, and after his death his minor son Haji Ramzan was in possession of the property in suit, that, on the contrary, the evidence establishes that Sakhi Mohamed was in possession of the property after Mooso's death in 1906, and continued to be in possession till his death in 1931, and that thereafter his heirs and legal representatives were in possession up to date of

suit. (His Lordship considered some of the evidence and continued):

[30] The learned Judge then proceeded to consider the evidence of Sakhi Mohamed, the father of the appellants, given in the case of *Usman v. Rupli* in 1915, and which was brought on the record of the present suit by consent of the parties. In that suit Sakhi Mohamed had stated :

"Wali Mohammad had no son or daughter of his own. He left a widow called Chotan. He left property worth 1½ or 2 lacs of rupees. It was inherited by Moosa my brother because Wali Mohamed had adopted him. The adoption was 34 or 35 years ago. After it Moosa was known as "Moosa Wali Mohamed." Moosa died 7 or 8 years ago, leaving a son Ramzan and a daughter Amina and a widow Saboli. Ramzan is now 12 or 13. He inherited Moosa's property, which is being managed by my brother Nek Mohamed. Neither I nor any of my brothers or sisters claimed from Moosa any share in property inherited by Moosa from Wali Mohamed. Nor did my uncle Mithoo so far as I am aware. My father left property worth about Rs. 22,000 to 25,000. Moosa got no share in it, when my father died."

The effect of this evidence is that Sakhi Mohamed had knowledge of the circumstances in which Mooso took possession of the property in suit, that he acquiesced in Mooso's possession from 1901 to 1906, and that from 1906 to 1915 he had knowledge of the circumstances in which Haji Ramzan, Mooso's son, took possession of the property in suit through his uncle Nek Mohamed. Sakhi Mohamed's statement contained in his deposition recorded in 1915 was clearly admissible under S. 32, Evidence Act. We agree with the learned Judge that S. 32, Evidence Act, is not controlled by S. 33. If any authority were needed in support of this proposition, it is to be found in two cases, *Shyamanand Das Mohapatra v. Rama Kanta Das Mohapatra*, (1904) 32 Cal. 6 and *Sulaiman v. The King*, A. I. R. (28) 1941 Rang. 301 : (43 Cr. L. J. 123). Woodroffe in his *Commentary on the Law of Evidence*, Edn. 9 at page 367, says :

"Again, the deposition of the deceased witnesses may under the preceding section be admissible even against strangers; as for instance, if they relate to a custom, prescription or pedigree where reputation would be evidence; for, as the unsworn declaration of persons deceased would be here received, their declarations on oath are *a fortiori* admissible."

It was argued by Mr. Lulla that the statements of Sakhi Mohamed in Ex. 24, were not true statements, that they were made to support the custom of adoption of which Sakhi Mohamed was a staunch supporter. We, however, agree with the learned Judge that statements made by Sakhi Mohamed in Ex. 24 are true. (After further considering the evidence, his Lordship concluded) :

[31] We are satisfied that during this period from 1901 to 1937 or 1938 neither Mooso nor Haji Ramzan recognised Mithoo and his heirs or Sakhi Mohamed and his heirs as co-sharers in

the property in suit. We hold that Mithoo and his heirs and Sakhi Mohamed and his heirs knew the circumstances under which Mooso had obtained possession of the property in suit and acquiesced in the hostile title of Mooso and his son Haji Ramzan and their possession from 1901 to 1937 or 1938.

[32] We have carefully considered Mr. Lulla's contention that Sakhi Mohamed was in possession of the property from 1906 to 1931, and we are satisfied from the admission of Sakhi Mohamed to which we have referred and the evidence of his brother Nek Mohamed that Sakhi Mohamed was not in possession of the property in suit from 1906 to 1931. We agree with the learned Judge that certain acts done by Sakhi Mohamed with reference to the property in suit must be attributed to the permissive character of his possession. The learned Judge was not impressed by the evidence of Mr. Petigara, a witness examined by the appellant, and we see no reason to rely upon his evidence.

[33] The learned Judge was also not impressed by the evidence of one Pitamber and Ganeshpuri, two other witnesses examined by the appellant. We think the learned Judge's appreciation of evidence was right, and we see no reason to take a different view.

[34] In view of our finding that Mooso and his son Haji Ramzan were in adverse possession of the property in suit from 1901 to 1938, the title of the appellants, if they had any, was extinguished, and the respondents acquired a good title to the property. It follows from this finding that the question of adverse possession by the appellants does not arise, the suit having been instituted by Haji Ramzan within a year or two of his dispossession by the appellants. The result is that we affirm the judgment and decree of the lower Court and dismiss the appeal with costs.

R.G.D.

Appeal dismissed.

A. I. R. (36) 1949 Sind 18 [C. N. 6.]

O'SULLIVAN AND THADANI JJ.

Ghulam Nabi s/o Faiz Mahomed — Appellant v. Kishinchand Shivaldas — Respondent.

First Appeal No. 4 of 1942, Decided on 11th March 1948. from judgment and decree of 1st Class Sub-Judge, Shikarpur, D/- 6th October 1941.

Specific Relief Act (1877), S. 15 — Manager of joint Hindu family agreeing to sell family property for purposes not binding on family — Suit for specific performance — Other members not made parties to suit — Plaintiff not prepared to purchase manager's share for entire consideration — Lower Court held justified in refusing to grant decree for specific performance for manager's share in property.

A filed a suit against B for specific performance of contract for sale of certain property entered into with B. A admitted in his plaint that the land in suit was

the joint family property of B and his two minor sons who formed the joint family with B as manager. The sons were not impleaded as defendants:

Held that as A claimed specific performance of the contract for sale involving the right, title and interest of the minors and sought to bind the interest of the minor sons it did not matter if the minors had not been impleaded in the suit and the lower Court was right in going into the question of the validity of alienation made by B. As the contract was held not binding on the minor sons and as A was not prepared to purchase the share of B only for the entire purchase money without being duly compensated for the loss, the lower Court was justified in refusing to grant a decree for B's one-third share in the property for specific performance: A. I. R. (8) 1921 Mad. 172 (F.B.) and A.I.R. (1) 1914 Mad. 456, *Rel. on.* [Paras 8, 11 and 14]

Annotation: ('46-Man.) Specific Relief Act, S. 15, N. 3.

Manghanmal Bhojraj—for Appellant.

Kishinchand—for Respondent.

Thadani J.—This is an appeal from the judgment and decree of the First Class Subordinate Judge of Shikarpur in suit No. 31 of 1941, in which he dismissed the plaintiff-appellant's suit for specific performance of a contract for the sale of certain agricultural property agreed to be sold by the respondent Kishinchand.

[2] The appellant's case as stated in Para. 4 of the plaint was that the land in suit was ancestral property of the defendant which came to his share upon a partition with his brothers and that at the time of the contract for sale the respondent and his two sons were members of a joint Hindu family of which the respondent was the manager.

[3] The respondent's main contention was that the land in suit did not belong to him exclusively: his two minor sons had each a third share. He denied that he was a manager of the Hindu joint family and claimed that in the circumstances alleged by him he could not be called upon specifically to perform the contract as he had no right to convey the undivided shares of his minor sons.

[4] Upon the pleadings the trial Court framed the following issues:

1. Is the plaint insufficiently stamped?
2. Has the defendant agreed to sell the land in suit along with the interest of the joint family? If so, can the plaintiff have specific performance of contract of the interest of the other members of the joint family of the defendants? (covers Paras. 18 and 21 of the written statement).
3. Has the defendant conveyed the right to recover Hakab in the Kario Kewalram as alleged in the plaint? If so, cannot such right be conveyed as alleged by the defendant in para. 12 of the written statement?
4. Is the plaintiff entitled to specific performance of the entire property? If so, to what extent?
5. Is the plaintiff entitled to any damages? If so, what?
6. What should the decree be?"

On issue 2 the trial Judge found as follows:

"I accordingly find that the defendant agreed to sell the land in suit along with the interest of the joint

family but that the plaintiff cannot have specific performance of the whole contract or even of the defendant's interest in the joint family property."

Mr. Manghanmal for the appellant has confined his arguments to issue 2 only. His contention is that having regard to the recitals in the agreement for sale, and the fact that the minor sons of the respondent have not been impleaded, his client is entitled to a decree for specific performance in terms of the agreement.

[5] The difficulty in accepting Mr. Manghanmal's contention arises from certain admissions made by the appellant in Para. 4 of the plaint and the operative part of the agreement which sets out what is sought to be conveyed. As the learned Judge points out, it is an admitted position that the land in suit is the joint family property of the respondent and his minor sons. Having regard to this admission, and the fact that what is sought to be conveyed by the respondent is his ancestral right in the property which amounts to a third undivided share, we do not think it matters that the respondent's sons have not been impleaded in the suit.

[6] The appellant's right to enforce specific performance of the contract in question will, in view of these two facts, be governed by the law affecting alienations made by the manager of a joint Hindu family in which other coparceners have an interest and by the provisions of S. 15, Specific Relief Act.

[7] The validity of alienations of joint Hindu family property made by the manager of the family depends upon the existence of a family legal necessity or payment of antecedent debts or upon proof of benefit accruing to the family estate. Upon this aspect of the case the trial Court has observed:

"It is not the case of the plaintiff that this alienation was for legal necessity or for payment of antecedent debts or for benefit of the estate. No specific performance of an agreement to sell by the manager of a joint Hindu family can be decreed unless it is shown that it is in the interests of minor members of the family and is beneficial to them: *Eari Charan v. Kaula Rai*, A.I.R. (4) 1917 Pat. 478: (2 Pat. L. J. 513 F.B.). There is nothing to show that the land was being sold for legal necessity or for payment of antecedent debts. The plaintiff has set up at the argument a plea that it was being sold for general benefit of the estate. It is said that the defendant being a Government servant was not able to take care of the land and that he wanted to utilize the purchase price in purchase of houses in the town of Shikarpur for rental purposes. The evidence shows that the land was looked after by defendant's cousin Tekchand and that the land was fairly productive. No investment in the purchase of houses is made and we are therefore not in a position to assess the comparative benefit that would have accrued to the estate. The question whether a transaction is for benefit of estate or not involves the consideration of something more than merely whether the purchase price paid is a good price; it involves the further question of what is to be done with the purchase money. To sell a piece of land at a very good price would not be beneficial if the purchase money was to be invested in doubtful undertakings. A

manager of a minor under Hindu law is not entitled to sell merely for the purpose of enhancing the value of the property of a minor or for increasing the minor's income, though it cannot be said that no transaction can be for the benefit of a minor which is not of a defensive character; *Hemraj v. Nathu Ramu*, A. I. R. (22) 1935 Bom 295 : (59 Bom. 525 F. B.). It is therefore clear that the defendant had no power to convey the interest of the minors in the land in suit."

Mr. Manghanmal for the appellant contends that as the minor sons of the respondent were not parties to the suit, and the appellant sought to enforce specific performance of the agreement of sale made by the respondent only, the trial Court was not called upon to decide the question of the validity of the alienation made by the respondent. But issue 2 specifically raises the question whether the respondent had agreed to sell the land in suit including the interest of the minors in the joint family property.

[8] It is not disputed by the appellant's advocate that the ancestral right of the respondent in the property in suit was only a third undivided share in the property. In the present suit, as the appellant claims specific performance of the agreement of sale involving the right, title and interest of the minors, and seeks to bind the interests of the respondent's minor sons, the learned Judge was right in going into the question of the validity of the alienation made by the respondent, and this was apparently done with the consent of both parties, judging from the wording of issue 2.

[9] It is true that had the finding on issue 2 been that the alienation made by the respondent bound the interests of his minor sons the finding would not have been binding on the sons, but as the finding of the learned Judge is against the validity of the alienation the question of the rights of the respondent's minor sons does not arise.

[10] Mr. Manghanmal has relied upon certain observations made by Kumaraswami Sastri J. in the Full Bench decision of the Madras High Court in *Baluswami Aiyar v. Lakshmana Aiyar and others*, 44 Mad 605 : (A. I. R. (8) 1921 Mad. 172 F. B.). At page 620, Kumaraswami Sastri J. observed :

"Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement, there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if the purchaser is willing to take such title as the vendor has. But where a party seeking specific performance seeks to bind the interests of persons not parties to the contract, alleging grounds which under Hindu law would bind their interests and enable the vendor to give a good title as against them and makes them parties it is difficult to see how the question as to the right of the contracting party to convey any interest except his own can be avoided and

a decree passed, the effect of which will merely be to create a multiplicity of suits."

Mr. Manghanmal contends that the appellant had not alleged any facts in the plaint which, if proved, would under the Hindu law bind the interests of the respondent's sons, and that it was therefore unnecessary for the trial Court to go into the question of the binding character of the alienation in so far as it affected the rights of the respondent's sons. But as we have observed, in view of the admission of the appellant in para. 4 of the plaint and the vague character of the agreement for sale by which the respondent sought to convey his ancestral rights, that is to say, his one-third undivided share in the property, it is not unreasonable to suppose that these two facts induced the appellant to have the question of the validity of the alienation in relation to the rights of the respondent's sons decided in the present suit. Mr. Manghanmal cannot therefore contend that the finding of the trial Court upon this aspect of issue 2 should be ignored, merely because the respondent's sons were not made parties to the suit.

[11] We think the decision of the Full Bench of the Madras High Court read as a whole supports the view that where a plaintiff seeks to bind the interests of the other coparceners as in this case by asking for specific performance of the agreement of sale of the joint property agreed to be sold by the manager of the joint family, it matters not if the other coparceners have not been impleaded, for the question of specific performance of an agreement such as the present depends upon the application of S. 15, Specific Relief Act. The learned Judges of the Madras High Court observed :

"We think the words of the section (S. 15, Specific Relief Act) apply where a member of an undivided family agrees to sell part of the joint property in which he has only a share ; and the present case is a particularly plain one, because according to the plaintiff's own evidence defendant 1 agreed to get the other members of the family to execute the sale deed. Further, the contract has been decided in the present suit not to be binding on the other members of the family, and to decree specific performance against defendant 1 only would be merely encouraging useless litigation."

In view of the finding of the trial Judge in the case before us that the agreement of sale was not binding on the minor sons of the respondent, it would, in our opinion, in the words of the learned Judges in *Nagiah v. Venkatarama Sastrulu*, 37 Mad. 387 : (A. I. R. (1) 1914 Mad. 456) "be encouraging useless litigation."

[12] There is another passage in the judgment of the Full Bench of the Madras High Court which tends to support the view that for the purposes of the application of S. 15, Specific Relief Act, it is sufficient if it is proved that the contract for sale made by a manager of the joint

Hindu family purports to convey the family property in which his sons are coparceners, and it is not proved that the alienation agreed to be made was for object sanctioned by Hindu law. It reads thus :

"Where the person contracting is the father or managing member of the family, he stands in a fiduciary relationship to the other members (*Annamalai Chetty v. Murugesu Chetty*, 26 Mad. 544 at p. 553: 30 I. A. 220 P. C.), *Sahuram Chandra v. Bhup Singh*, 39 All 437: (A. I. R. (4) 1917 P. C. 61) and his contract to sell the entire item of joint family property for purposes not binding on them is a breach of duty, and I do not think the Court ought to compel execution of a sale-deed in such cases of the entire item of property leaving it to the other members to incur the expense and go through the trouble of filing a suit to protect their interests. (See *Gurusami v. Ganapathia*, 5 Mad. 337, F. B. and *Baikuntha Barik v. Shib Dass*, 2 C. L. J. 321). There is, however, no objection to the share of the vendor being ordered to be conveyed in cases where he can dispose of his share, as he will then only be exercising his right without detriment to anybody else. The question referred to the Full Bench of the Madras High Court in *Baluswami Aiyar v. Lakshmana Aiyar and others*, 44 Mad. 605 : (A. I. R. (8) 1921 Mad. 172 (F. B.) was :

was : "Where the managing member of a joint Hindu family enters into a contract to sell an item of family property, and that contract is not proved to be binding on the other members, can specific performance of it be decreed against him, and if so, on what terms ?"

Kumaraswamy Sastri J. delivering the judgment of the Full Bench answered it thus (p. 629) :

"My answer to the question is that S. 15, Specific Relief Act applies to cases covered by the order of reference and that specific performance cannot be granted of the contract so as to direct execution of a conveyance of the entire property, and that it is open to the purchaser to get specific performance so far as the share of the vendor is concerned on payment of the consideration agreed upon without any abatement."

Mr. Manghanmal has next contended that assuming S. 15, Specific Relief Act, applies, the trial Judge should have granted a limited decree in conformity with the decision of the Full Bench of the Madras High Court to which we have referred.

[13] It appears, however, that at the trial the appellant made a statement in writing through his advocate to the following effect:

"I am not prepared to purchase the share of Kishinchand only in the property agreed to be sold for the entire purchase price of the land without being duly compensated for the loss so caused."

[14] In view of this statement the trial Court was justified in refusing to grant a limited decree for specific performance.

[15] In the result we affirm the judgment and decree of the trial Court and dismiss the appeal with costs.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Sind 21 [C. N. 7.]

O'SULLIVAN AND THADANI JJ.

Commissioner of Income-tax, Bombay, Sind and Baluchistan, Bombay—Applicant v. Kalechand Motiram—Respondent.

Reference No. 110 of 1944, Decided on 15th January 1948, made by Registrar, Income-tax Appellate Tribunal, Bombay, D/- 22nd September 1944.

Income-tax Act (1922), S. 4 (3) (i)—Property held under trust — Mere placing certain amount in account book and applying accruing interest towards charitable purpose not to amount to trust.

Mere placing of an amount in an account and applying the accruing interest towards a charitable purpose does not amount to a trust. The situation is not altered merely by describing the account as for "dharam" or "dharmada." [Para 7]

One U opened an account in his books crediting to this account the sum of Rs. 30,000 and debiting himself personally with a like amount. The assessee who continued the business of U credited interest in the said account, from year to year. Assuming that U intended to create a trust in respect of a sum of Rs. 30,000 no trustee was appointed, much less was there any transfer of the trust property to a trustee or an acceptance of this trust by the trustee. Moreover, neither the purpose of the trust nor the beneficiary had been indicated with reasonable certainty :

Held that sum of Rs. 1405 shown as interest in the assessee firm's books could not be exempted from taxation on the ground that it was income derived from property held under trust, or other legal obligation wholly for religious or charitable purposes within the meaning of S. 4 (3) (i). [Paras 1 & 10]

G. L. Pophale — for Applicant.

Lokumal Naraindas — for Respondent.

O'Sullivan J. — This is a reference by the Commissioner of Income-tax, Bombay, Sind and Baluchistan, under S. 66 (1), Income-tax (Amendment) Act, 1939, raising the question as to whether a sum of Rs. 1405 shown as interest in the assessee firm's books in a certain account headed: "Udharam Virumal Dharmada Account" should be exempted from taxation on the ground that it was income derived from property held under trust, or other legal obligation wholly for religious or charitable purposes within the meaning of S. 4 (3) (i), Income tax Act.

[2] It would appear that shortly before his death in the year 1928 one Udharam Virumal, a Karachi merchant, opened an account in his books under the heading set out above crediting to this account the sum of Rs. 30,000 and debiting himself personally with a like amount. The respondent assessee who continued the business of Udharam Virumal credited interest in the said account, from year to year.

[3] For the first time in the assessment year 1940-41, the income-tax authorities decided to include the sum of Rs. 1405 being the interest shown in the account for that year, in the total income of the assessee firm. On appeal to the Appellate Assistant Commissioner this amount

of Rs. 1405 was excluded from the total income of the assessee-firm. The Income-tax Commissioner then appealed to the Appellate Tribunal who upheld the decision of the Appellate Assistant Commissioner.

[4] Being dissatisfied with the Tribunal's decision, the Commissioner of Income-tax has had this reference made to this Court under S. 66 (1) of the Act.

[5] Paragraph 6 of the Statement of the case by the Tribunal summarises the point at issue as follows:

"The only point in contest before us was whether setting apart and placing the fund in the 'Udharam Virumal Charity Account' under the circumstances stated before constituted a valid trust for religious or charitable purposes, so as to exempt the income from taxation under S. 4 (3) (i) of the Act. On a consideration of the question, we held that a valid trust had been declared. We have recorded our reasons in para. 5 of our judgment."

[6] The grounds upon which the Tribunal held that there had been a valid trust for charitable or religious purposes by Udharam Virumal are set out in para. 5 of their judgment as follows:

"The question then is whether there is valid trust for a charitable or religious purpose in this case. It may be conceded that the mere placing of an amount in an account and applying the interest earned by it towards charitable purpose will not amount to a trust. The facts in the present case, however, are entirely different. Late Udharam Virumal opened an account which is expressly described as a charity account, and transferred an amount of Rs. 30,000 from his personal account to it. This act clearly reflects his intention to divest himself of the (?) settle the amount upon trust for those purposes. We think that it was an error to suppose that it continues to be a party (?) of the deceased's estate, since it is admitted that his three sons who succeeded to it and those that have succeeded to the latter have not only (not?) claimed any interest in the funds but have been faithfully applying the annual interest towards the charitable and religious objects. In other words, the sons and grandsons of deceased Udharam are holding the fund as trust fund, as trustees. Further, after the Appellate Assistant Commissioner's decision in this case the Income-tax Officer asked the assessee to file a sworn declaration that they had no interest in the fund or the income. It is difficult to understand the Income-tax Officer's requiring such a declaration after the matter had passed his hands. But that is not to the purpose. In compliance with the order, Mr. Motiram who is the surviving son of the late Udharam and partner of the assessee firm filed a sworn declaration in which he has stated that none of the heirs of the deceased claim any interest in the fund. Lastly we have the admitted fact that the income-tax authorities continuously excluded the interest from being assessed to tax until the present assessment."

[7] We are of opinion that the view of the Appellate Tribunal is not justified. As the Tribunal have themselves pointed out, the mere placing of an amount in an account and applying the accruing interest towards a charitable purpose does not amount to a trust. The situation is not altered merely by describing the account as for "dharam" or "dharmada." The Tribunal

appears to have overlooked the necessary incidents of a valid trust. A "trust" is defined in the Trusts Act as follows:

"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner: the person who reposes or declares the confidence is called the 'author of the trust;' the person who accepts the confidence is called the 'trustee;' the person for whose benefit the confidence is accepted is called the 'beneficiary;' the subject-matter of the trust is called 'trust property' or 'trust money;' the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust property; and the instrument, if any, by which the trust is declared is called the instrument of trust."

[8] Section 5 requires that in order to create a valid trust of moveable property, the trust shall be declared by a non-testamentary instrument in writing signed by the author of the trust and registered or by will, unless the ownership of the property is transferred to the trustee. Section 6 which relates to the creation of a trust is as follows:

"Subject to the provisions of S. 5 a trust is created when the author of the trust indicates with reasonable certainty by any words or acts (a) an intention on his part to create thereby a trust, (b) the purpose of the trust, (c) the beneficiary, and (d) the trust property, and (unless the trust is declared by will or the author of the trust is himself to be the trustee) transfers the trust-property to the trustee."

Assuming in this case that Udharam Virumal intended to create a trust in respect of a sum of Rs. 30,000 no trustee was appointed, much less was there any transfer of the trust property to a trustee or an acceptance of this trust by the trustee.

[9] Moreover, neither the purpose of the trust nor the beneficiary have been indicated with reasonable certainty. A gift or trust in favour of "dharam" is void for vagueness and uncertainty. This point is dealt with in Mulla's Hindu Law, p. 472 para. 405 under the heading "gift to dharam void." After specifically stating that a gift or bequest to dharam is void for vagueness and uncertainty, the learned commentator goes on to discuss various cases including decisions of the Judicial Committee of the Privy Council in support of his proposition. He says:

"It is a maxim of equity, that the execution of a trust shall be under the control of the Court. The trust therefore must be of such a nature that it can be under that control. For that purpose it is necessary that the subject or object can be ascertained by the Court. If the subject or object cannot be ascertained, the trust cannot be enforced by the Court, and it is void. In the case of a gift to *dharam* the Judicial Committee observed in *Runchordas v. Parvatibai*, 23 Bom. 725 : (26 I.A. 71 P.C.) that the objects which can be considered to be meant by that word are vague and uncertain. In Wilson's dictionary the word "*dharam*" is defined to be law, virtue, legal or moral duty. Relying upon this definition of *dharam* the Judicial Committee held that the word

'*dharam*' was as vague as the words 'purposes charitable or philanthropic' which on account of their vagueness, render a trust for those purposes void in the English law. Gifts for 'charitable or other purposes' or gifts expressed in other alternative terms are not charitable; for they may be executed without any part of the property being applied to charitable purposes."

This aspect of the matter appears to have been overlooked by the Tribunal. It is obvious that the so-called trust in this case cannot be controlled or enforced by the Court. The questions as drafted and referred to us by the Tribunal covering the point at issue are:

(1) Whether there was evidence before the Tribunal on which it could be held that the sum of Rs. 30,000 was held under trust or other legal obligation wholly for religious or charitable purposes within the meaning of S. 4 (3) (i), Income-tax Act;

(2) Whether in the circumstances of the case the amount of Rs. 30,000 placed in the "Udharam Virumal Dharmada Account" was rightly considered to be property held under trust or other legal obligation wholly for religious and charitable purposes within the meaning of S. 4 (3) (i) of the Act.

[10] For the reasons given above, our answers to these questions are both in the negative. We allow the Commissioner's costs.

D.H. *Answers in the negative.*

A. I. R. (36) 1949 Sind 23 [C. N. 8.]

THADANI AND CONSTANTINE JJ.

Hatimshah s/o Akbarshah — Plaintiff — Appellant v. Ahmedshah and others—Defendants—Respondents.

First Appeal No. 53 of 1943, Decided on 5th December 1947.

Civil P. C. (1908), O. 22, R. 4—Legal representative of deceased defendant already on record in capacity of plaintiff — He may apply at any time to be impleaded as legal representative — Order of abatement for want of application within time can be set aside—Civil P. C. (1908), S. 151.

Where the legal representative of one of the defendants is already on the record in the capacity of the plaintiff, he may make an application at any time to be impleaded as the legal representative of the deceased. In such a case, for want of an application within limitation to be impleaded, the suit against the deceased does not abate: A. I. R. (27) 1940 Bom. 259, *Applied*.

The Court has wide powers to set aside the order of abatement passed in such a case: A. I. R. (20) 1933 Sind 36 and A. I. R. (12) 1925 Pat. 162, *Rel. on*.

[Paras 1 and 2]

Annotation: ('44-Com.) Civil P. C., O. 22 R. 4 N. 12 and 24.

Jamiatrai Lalchand — for Appellant.

Manghanmal Bhojraj—for Respondents.

Constantine J.—The plaintiff-appellant filed a suit against his two sons, Ahmedshah and Ibrahimshah, for partition of certain properties, which had come to the parties by inheritance. Ibrahimshah, defendant 2, died on 26th December 1942. On 11th January 1943 the plaintiff filed an application entitled as under O. 22, Rr. 3 and 4,

Civil P. C., requesting the Court to join as heirs of the deceased his son, two daughters and widow. On 25th January 1943 the Court stated that defendant 1 had no objection and ordered that the persons mentioned in the application should be joined as legal representatives of defendant 2. On 5th April 1943, the plaintiff made an application under O. 22, R. 5 and S. 151, Civil P. C., stating that through mistake in his previous application the plaintiff had not shown himself as an heir of the deceased Ibrahimshah and praying that he should be added as the legal representative. The learned Sub-Judge dismissed that application on the ground that it had been made more than 90 days after the date of Ibrahimshah's death, which he found had occurred on 26th December 1942, a finding which has not been challenged by the appellant, as he was. The learned Judge relied upon *Khodadad v. Bai Jerbai*, I. L. R. (1938) Bom. 64 : (A. I. R. (25) 1938 Bom. 6). But this decision of Engineer J., sitting alone, has been overruled by a Division Bench of Bombay High Court in *Naranlal v. Shivprasad*, A.I.R. (27) 1940 Bom. 259 : (I. L. R. (1940) Bom. 487). In this latter case the plaintiff sued to recover possession of certain property as the reversioner of the previous owner. The plaintiff died and his three sons were brought on record as heirs. It was contended that besides the three sons the plaintiff had left a widow named Bai Hira. But she also died within less than 90 days from the date of the plaintiff's death and her heirs were the three sons of the plaintiff who were already on the record. In that case these sons were plaintiffs, as legal representatives whether of their father or their mother. In the present case the plaintiff was on record already as plaintiff but not as a legal representative of the deceased defendant. We do not think, however, that this difference in the facts makes any difference in the principle to be applied, since Rr. 3 and 4 of O. 22 speak of making a legal representative a party, and whether a litigant is a plaintiff or defendant, he is a party to the suit. As Sir John Beaumont C. J. said :

"... if a party is on the record, he can appear and make any representation which seems good to him, whether in one capacity or in more than one capacity, and being on the record, it is competent to him to put in a plaint or defence stating his attitude in the different capacities in which he is suing or being sued. On its being brought to the notice of the Court that the record does not show that he is suing or being sued in more than one capacity, it is the duty of the Court to have the record amended. But an amendment of that sort can be made at any time, and if an application were made to strike out a pleading on the ground that the interest of the party pleading was not properly shown on the record, the Court would amend the record, and not strike out the pleading there is no justification for enlarging the words of O. 22, R. 3 so as to cover a case where all that is required is formal

amendment of the record, and not the addition of new parties."

With respect we agree with this view of O. 22, R. 3, and consider that this principle applies equally to O. 22, R. 4.

[2] The application on 5th April 1943, in which the plaintiff applied to be brought on record as a legal representative, was within 150 days from the death of Ibrahimshah on 26th December 1942. In *Hassomal Hardasmal v. Pirbux and others*, 26 S. L. R. 81: (A. I. R. (20) 1933 Sind 86), Milne J. C. delivering judgment of the Division Bench stated:

"Even if we were to regard that application (under O. 22, R. 9) as time barred, there was still the application under O. 22, R. 4, pending which according to the finding of the learned Judge was made after the suit had abated and in view of the ruling in *Hari Saran Singh and others v. Syed Muhammad Eradat Hussain*, 85 L. C. 1010: (A. I. R. (12) 1925 Pat 162), we are of opinion that it would be open to us to consider the pending application under O. 22, R. 4 as an application under O. 22, R. 9."

The learned Judicial Commissioner also stated that the Court has wide powers to set aside such an abatement and these powers should be used somewhat liberally unless there is clear proof of laches.

[3] We, therefore, set aside the order of the learned Sub-Judge refusing to set aside the abatement and in lieu thereof we set aside the abatement. The respondent Ahmedshah will bear the costs of the appellant of this appeal.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Sind 24 [C. N. 9.]

O'SULLIVAN AND THADANI JJ.

Hariram Khiram, a Firm — Applicants v. Gobindram Rattan Chand, a Firm — Opponents.

Civil Revn. Appln. Nos. 40 and 41 of 1945, Decided on 11th March 1948, from order of Chief Judge of Small Cause Court, Karachi, D/- 18th April 1945.

Arbitration Act (1940). S. 8 — Reference to appointed arbitrators — Failure of one of arbitrator to act — Procedure to be followed is one laid down in S. 8 and not S. 9 — S. 9 applies to case where reference is to arbitrators to be appointed — Vacancy caused by inability of one of arbitrators to act not filled in as required by S. 8 — Reference lapses and parties are free to resort to civil Court for settlement of their dispute.

Where in the case of an arbitration agreement in which provision is made for reference to two appointed arbitrators, one of the appointed arbitrators refuses to act or is incapable of acting or dies the procedure to be followed is the one that is laid down in S. 8 and not the one laid down in S. 9. Section 9 has no application to an arbitration agreement which provides for a reference to appointed arbitrators as distinguished from arbitrators to be appointed. Thus on the refusal of the appointed arbitrator to act, and on the failure of a party to serve the other party with a notice as contemplated by S. 8 (1), to concur in the appointment or in supplying the vacancy, the procedure to be followed

is one laid down in S. 8 (2). And where no application is made to the Court, as required by S. 8 (2), the reference lapses and the parties are free to resort to civil Court for settlement of their disputes. The procedure laid down by S. 9, is inapplicable: A. I. R. (16) 1929 Cal 177, *Rel. on.*

(The Court did not think itself justified in permitting the defaulting party to rectify its error in procedure, at the stage of revision, and allowing it to supply the vacancy through the assistance of the Court as provided by S. 8). [Paras 6, 8 and 9]

Annotation: ('46-Man.) Arbitration Act, S. 8, N. 1; S. 9, N. 1.

Manghanmal Bhojraj—for Applicants.

Fatehchand Assudomal—for Opponents.

Thadani J. — These are two revision applications arising out of an order passed by the Chief Judge of the Small Causes Court, Karachi, in Suits Nos. 620 and 621 of 1944, by which he stayed the suits upon an application made in that behalf under S. 34, Arbitration Act.

[2] The suits were filed by Hariram Khiram a firm against Messrs. Gobindram & Sons and arose out of two commercial transactions relating to the purchase of 250 and 600 bags of white gram by Messrs. Gobindram & Sons from Messrs. Hariram Khiram.

[3] The facts material to the applications are these: On 17th December 1942 Hariram Khiram and Gobindram & Sons executed an arbitration agreement which provided for a reference in these terms:

"Whereas differences or disputes have arisen and are still subsisting between Messrs. Gobindram Rattan Chand carrying on business at Sukkur (hereinafter referred to as the party No. 1) of the one part and Messrs. Hariram Khiram carrying on business at Thal Upper Sind Frontier Dist.) hereinafter referred to as the party No. 2) of the other part, relating to 600 bags white gram purchased by the party No. 1 from the party No. 2 on bilti terms: And whereas the party No. 1 has nominated Seth Pheroomal Lilaram as their arbitrator and the party No. 2 has nominated Bhai Assandas of Seth Jeramdas Khialdas as their arbitrator:

Now we the parties afore-said do hereby appoint the said Seth Pheroomal and Bhai Assandas as our arbitrators to decide the said disputes in any manner they think fit and proper. In case of disagreement between the arbitrators they are empowered to appoint an umpire.

The award of the arbitrator or the umpire, as the case may be, shall be final and binding on both the parties."

In pursuance of the reference, Pherumal Lilaram the arbitrator appointed by Gobindram & Sons, the defendants in the suit, wrote to the parties calling upon them to appear before the arbitrators with all their evidence on 25th February, 1943. On the 25th nothing was done as Gobindram & Sons did not attend the hearing. On the 26th the arbitrators fixed another hearing for 5th March 1943. On 5th March 1943 the arbitrators held some proceedings and called upon Messrs. Gobindram & Sons to produce their Sukkur *noonah* book at the adjourned hearing which

was fixed for 12th March 1943. On 12th March 1943, Gobindram & Sons wrote to the arbitrators pointing out that the time given to them for the production of the *noondh* book was insufficient and requested the arbitrators to give them further time for a fortnight. On the 15th of March the arbitrators intimated to the parties that in accordance with the request made by Gobindram & Sons the hearing was adjourned to 1st April 1943. From 1st April 1943 to July 1943 nothing was done by the arbitrators. On 7th July 1943, Bhai Assandas, the arbitrator appointed by Hariram Khiaram wrote to the defendants Gobindram & Sons, expressing his inability to act as an arbitrator. On 12th August 1943, Gobindram & Sons wrote to Khiaram that as Assandas had expressed his inability to act, Hariram Khiaram should appoint another arbitrator. On 20th August 1943, Hariram Khiaram sent a reply stating that as the firm of Hariram Khiaram had ceased to exist, it would not serve any purpose to proceed with the arbitration. On 6th September 1943 Gobindram & Sons wrote to Hariram Khiaram that as they had failed to appoint an arbitrator, they appoint Mr. Holaram as an arbitrator on their behalf. Hariram Khiaram refused to recognise the appointment of Holaram and contended that the reference had lapsed by reason of the inability of Bhai Assandas, the arbitrator appointed by them under the arbitration agreement, to proceed with the arbitration. On 14th October 1943, Gobindram and Sons through their advocate wrote to Hariram Khiaram stating that as it is possible that the appointment of Seth Holaram made by them may be challenged, they appointed their arbitrator Pherumal Lilaram nominated in the arbitration agreement to act as the sole arbitrator in the dispute and required Hariram Khiaram to appear before him. Nothing happened between 14th October 1943 and 25th February 1944. On 25th February 1944, Pherumal Lilaram gave notice to the parties fixing the hearing of the arbitration for 6th March 1944. On 7th March 1944, Hariram Khiaram wrote to Pherumal Lilaram disputing his authority to proceed with the arbitration and informed him that he had filed suits in respect of the matters in dispute.

[4] Shortly after the institution of the suits on 18th July 1944, Gobindram and Sons, the defendants in the suits, applied for a stay of the suits. The learned Judge stayed the suits holding that there was an arbitration agreement within the meaning of the Arbitration Act, 1940, and that S. 34, Arbitration Act, 1940, applied in terms to the subject-matters involved in the suits.

[5] We think in dealing with the applications for stay the learned Judge has lost sight of the

provisions of S. 8, Arbitration Act of 1940. Section 8 reads :

"8. (1) In any of the following cases :

(a) where an arbitration agreement provides that the reference shall be to one or more arbitrators to be appointed by consent of the parties, and all the parties do not, after differences have arisen, concur in the appointment or appointments or

(b) if any appointed arbitrator or umpire neglects or refuses to act, or is incapable of acting, or dies, and the arbitration agreement does not show that it was intended that the vacancy should not be supplied, and the parties or the arbitrators, as the case may be, do not supply the vacancy : or

(c) where the parties or the arbitrators are required to appoint an umpire and do not appoint him ; any party may serve the other parties or the arbitrator as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy

(2) If the appointment is not made within fifteen clear days after the service of the said notice, the Court may, on the application of the party who gave the notice and after giving the other parties an opportunity of being heard appoint an arbitrator or arbitrators or umpire, as the case may be, who shall have power to act in the reference and to make an award as if he or they had been appointed by consent of all parties."

The learned Judge does not appear to have appreciated the difference in the language of S. 8 (1) (b) and S. 9 of the Act. On a plain reading of S. 8, it should have been manifest to the learned Judge that whereas under S. 8 (1) (a) the arbitration agreement contemplates a reference to one or more arbitrators *to be* appointed by the consent of the parties, cl. (b) of S. 8 (1) contemplates an *appointed* arbitrator or umpire. The learned Judge has apparently construed the arbitration agreement in question to fall within the purview of S. 9, Arbitration Act of 1940. But S. 9 does not refer to an arbitration agreement in which provision is made for a reference to appointed arbitrators. Section 9 deals with an arbitration agreement in which provision is made for a reference to two arbitrators, *one to be appointed* by each party.

[6] In the arbitration agreement before us, provision is made for reference to two appointed arbitrators. The procedure to be followed in a case where the appointed arbitrator refuses to act or is incapable of acting or dies, is laid down in S. 8 itself, which lays down that

"any party may serve the other parties or the arbitrators, as the case may be, with a written notice to concur in the appointment or appointments or in supplying the vacancy."

It is common ground that in this case no such written notice was given to Hariram Khiaram to concur in the appointment or in supplying the vacancy.

[7] Sub-section (2) of S. 8 of the Act lays down that :

"If the appointment is not made within fifteen clear days after the service of the said notice, the Court may

on the application of the party who gave the notice . . . appoint an arbitrator."

[8] In the present case it is an admitted position that no such application was ever made to the Court. The procedure which has been followed by the defendants is the procedure laid down by S. 9, Arbitration Act which has no application to an arbitration agreement which provides for a reference to *appointed* arbitrators as distinguished from arbitrators *to be appointed*.

[8a] This aspect of the case has been considered by the Division Bench of the Calcutta High Court in *General Electric Trading Co. v. Siemens (India) Limited*, 56 Cal. 848 : (A. I. R. (16) 1929 Cal. 177). In that case an application was made under S. 19, Arbitration Act, 1899, corresponding to S. 34, Arbitration Act of 1940. C. C. Ghose J. delivering the judgment of the Division Bench observed :

"Now, in this case, *two* arbitrators have been mutually agreed upon and they have been appointed as such by the parties. Therefore, S. 9, Arbitration Act has no application, because the language used therein has reference to a case where the submission is to two arbitrators one *to be appointed* by each party. Let us next see whether there is anything in the language used in S. 8, Arbitration Act, which prevents the application of S. 8 to this case, having regard to the events that have happened. Section 8 (1) (a) obviously has no application, because it deals with the case of a reference to a single arbitrator. Turning to S. 8 (1) (b), there is nothing, in my opinion, in the language used therein which would render it inapplicable to this case. To start with, the arbitrator who has refused to act, etc., is *an appointed arbitrator*. In the second place, the submission does not show that the place of the arbitrator who has refused to act, etc., should not be filled up. In the third place, it is clear that the parties have not cared to fill up the vacant place. Therefore, I do not see why S. 8 (1) (b) should not apply. This is the conclusion I come to on the language used in the section."

It is not necessary to refer to other passages in the judgment of the learned Judge which deal with the view of Scott C. J. of the Bombay High Court* in the matter of the interpretation of S. 8 (1) (b) as it stood before the Arbitration Act of 1940. Under the Arbitration Act of 1940, no such difficulty as was present before Scott C. J. arises in the interpretation of S. 8 (1) (b). Even in the matter of the interpretation of S. 8 (1) (b), as enacted in the Arbitration Act of 1899, Ghose J. disagreed with Scott C. J., and agreed with Marten J. who held that where provision is made for a reference to two appointed arbitrators, S. 8 (1) (b) applied.

[9] We think the order of the Chief Judge of the Small Causes Court staying the suits should be set aside. The arbitration agreement was executed in 1942, and one of the appointed arbitrators refused to act as far back as 1943 and no attempt has been made at any time to supply the

vacancy through the assistance of the Court as provided by S. 8, Arbitration Act, 1940. We do not think we would be justified in permitting the defendants at this late stage to rectify their error of procedure.

[10] We therefore set aside the order of the learned Small Causes Court Judge staying the two suits, and direct him to proceed with the suits and dispose of them according to law. The application is allowed in the Court.

R.G.D.

Application allowed.

A. I. R. (36) 1949 Sind 26 [C. N. 10.]

O'SULLIVAN AND THADANI JJ.

Hassomal Tillumal—Applicant v. Ghulam Nabishah—Opponent.

R. A. No. 84 of 1945, Decided on 11th March 1948.

Civil P. C. (1908), O. 9, R. 3 and O. 17, R. 2—Suit dismissed on adjourned hearing for default of appearance of both plaintiff and defendant—Plaintiff's application for restoration dismissed—O. 17, R. 2 read with O. 9, R. 3 applied and no appeal lay against order of dismissal.

The Code of Civil Procedure is and is intended to be exhaustive of the circumstances in which a suit may be dismissed for default : 29 Cal. 707 (PC), *Rel. on.*

[Para 24]

The provisions of O. 9 by themselves do not apply to adjourned hearings, but the effect of O. 17 R. 2 is to assimilate the procedure contemplated in O. 9 to adjourned hearings.

[Para 7]

The suit was adjourned for hearing on 17th May 1944, upon which date both the plaintiff and the defendant were absent, and it was dismissed by the Subordinate Judge who made the following order :

"The plaintiff absent. His pleader remained absent. Defendant is *ex parte*. The suit is dismissed."

The defendant had been absent on two earlier hearings, to wit, on 28th April 1944 and 5th May 1944. The *ex parte* order had been passed on the earlier date. On 5th May 1944 the case had been adjourned to 17th May 1944 at the request of the plaintiff to enable him to produce *ex parte* proof. An application was made by the plaintiff to restore the suit on the ground that he was unaware of the date of hearing. Subordinate Judge dealt with it as one under O. 9, R. 9, Civil P. C. and dismissed it on the merits, holding that the plaintiff had failed to make out sufficient cause for his non-appearance:

Held that O. 17, R. 2 read with O. 9, R. 3 applied and no appeal lay against the order of dismissal : A. I. R. (32) 1945 Sind 98 and A. I. R. (30) 1943 Sind 94, *Rel. on.*

[Paras 25 & 26]

Annotation: ('44-Com.) C. P. C., O 17 R 2 N 7 Pt 4.

Manghanmal B.—for Applicant.

Fatehchand Assudomal—for Opponent.

O'Sullivan J.—This is a revision application against an order by the District Judge of Hyderabad restoring a suit. The suit had been fixed for hearing on 17th May 1944, upon which date both the plaintiff and the defendant were absent, and it was dismissed by the Subordinate Judge of Mirpurkhas who made the following order : "The plaintiff absent. His pleader remained absent. Defendant is *ex parte*. The suit is dismissed."

in or charge upon the property. A contracting party may have a right to sue for damages for breach of contract or for specific performance, but that is a different thing. [Paras 10 and 11]

Annotation: ('45-Com.) T. P. Act, S. 54 N. 23.

(b) Income-tax Act (1922), S. 4A — "Residence" — Question of ownership of property is not material

The question of ownership of property is not important for the purposes of determining residence, for if a person maintains or has maintained for him a residence, he need not be the owner; he may be a tenant only. [Para 11]

Annotation: ('46-Man.) Income-tax Act, S. 4A, N. 1.

(c) Income-tax Act (1922), S. 4A — No retrospective operation.

The definition enacted in S. 4A by the amendment in 1939 cannot be applied retrospectively for determining residence in 1937-38. [Para 12]

Annotation: ('46-Man.) Income-tax Act, S. 4A N. 1.

(d) Income-tax Act (1922), S. 4A — Occasional visit will not constitute residence — Such stay, when constitutes residence indicated.

It is true that a man may have residence in two places, but an occasional visit will not constitute residence. A man can, however, be considered resident in a country, if as part of his regular habit of life, he stays in that country in his own establishment or even in hotels for prolonged periods every year spending the rest of the time abroad. [Para 13]

Annotation: ('46 Man.) Income-tax Act, S. 4A N. 1.

(e) Income-tax Act (1922), S. 4A — Assessee leaving India in 1931 with his wife and away till January 1939 except for short stay in 1935 for four months and in 1937 for 14 days — Assessee could not be considered to be "resident" for 1937-38.

Where the assessee had left India for Java with his wife in 1931 and was away till 3rd January 1939, except for four months in 1935 and 14 days in 1937, the assessee could not be said to have resided in British India in 1937-38, when throughout that year he lived with his wife in Java except for a visit to British India for 14 days. [Para 13]

Annotation: ('46-Man.) Income-tax Act, S. 4A N. 1.

(f) Income-tax Act (1922), S. 4A — Domicile and residence is not same thing.

Domicile and residence are not the same thing for the purposes of determining domicile. The decisive consideration is whether a person comes to a country with a view to permanently settle in it. But it is not so, while considering the question of 'residence' for the purposes of the income-tax. [Para 15]

Annotation: ('46 Man.) Income-tax Act, S. 4A N. 1 and 2.

(g) Income-tax Act (1922), S. 1 — Interpretation of Act — English decisions have to be applied with caution: A. I. R. (19) 1932 P. C. 138 and A. I. R. (30) 1943 P. C. 153, *Rel. on.* [Para 15]

Annotation: ('46 Man.) Income-tax Act, S. 1 N. 2.

(h) Income-tax Act (1922), S. 4A — "Resident" indicates personal quality and is not descriptive of person's property: 1928 A. C. 217, *Rel. on.* [Para 21]

Annotation: ('46-Man.) Income-tax Act, S. 4A N. 1 and 2.

(i) Income-tax Act (1922), S. 66 (2) — New point — Point not raised before the Appellate Assis-

tant Commissioner cannot be raised in an application under S. 66 (2): A. I. R. (19) 1932 Sind 189, *Rel. on.* [Para 26]

Annotation: ('46-Man.) Income-tax Act, S. 66 N. 21.

(j) Income-tax Act (1922), S. 4A — "Residence" — Assessee leaving British India with wife in 1931 and remaining in Java till 1939, except for four months in 1935 and for 14 days in 1937-38 — During latter stay assessee negotiating purchase of house — Money spent over repairs but house occupied for first time in 1939 when conveyance was executed — *Held* assessee was not resident in British India in 1937-38 and 1938-39.

The assessee who was a native of India, in 1931 left with his wife for Java where he remained till 3rd January 1939, except for four months in 1935, when he and his wife were at Karachi, and except for a period of 14 days in the accounting year 1937-38 when he alone visited Karachi and stayed as a guest of a relative. After 3rd January 1939, the assessee has been continuously in British India except for 2 months in the autumn of 1939. While in Karachi in 1937, the assessee paid Rs. 23,000 to his brother, N, in respect of a house in Karachi. This house was let out on rent for 2 months in 1937. Thereafter, it was extensively repaired and altered under instructions from the assessee. For this purpose, he remitted sums amounting to Rs. 30,000 during the years 1937-38. On his return to British India in January 1939, the assessee occupied the house for the first time. In June 1939 a conveyance was executed by which N transferred the house to his minor son who had in the meantime been adopted by the assessee. The Income-tax Department held, on the facts, that the assessee was resident of British India in the accounting years 1937-38 and 1938-39.

Held that the assessee was not a "resident" in British India during 1937-38 and 1938-39: (1927) 137 L. T. 66 and 1928 A. C. 217, *Disting.*

[Paras 22 and 24]

Annotation: ('46-Man.) Income-tax Act, S. 4A N. 1 and 2.

Hukmatrai Idnani (in No. 37) and *Colah* (in Nos. 110 and 111) — for Applicant.

Colah (in No. 37) and *Hukmatrai* (in Nos. 110 and 111) — for Opponent.

Meher J. — This is a reference by the Commissioner of Income tax, Bombay, Sind and Baluchistan under S. 66 (2), Income-tax Act, forwarding two statements of cases on the requisition of the assessee, in respect of assessment for the years 1938-39 and 1939-40 (accounting years 1937-38 and 1938-39 respectively). The Commissioner has referred the following four questions in respect of the assessment for 1938-39:

"(1) Whether an objection to the jurisdiction of the assessing officer can form the subject of a reference under S. 66 (2) of the Act.

(2) If question (1) be answered in the affirmative, whether in the circumstances of this case the assessment is invalid on the ground that the assessing officer has no jurisdiction, and

(3) Whether in the circumstances of this case the assessee has been rightly held to be resident in British India for the purposes of the Act."

In respect of the assessment for 1939-40, the first three questions are the same, but there is an additional question number four, and it is:

"(4) Whether the income from property has been rightly included in the assessment."

[2] The facts set out by the Commissioner in the statement of the case are as follows: The assessee is a native of Sind. In 1931 he left India for Java where he remained till 3rd January 1939 except for four months in 1935, and except for the period, 21st June 1937 to 5th July 1937, i. e. 14 days in the accounting year 1937-38, when he was at Karachi. After 3rd January 1939, the assessee has been continuously in British India except for four months in the autumn of 1939. From 1st January 1939, the assessee's business in Java was transferred to a private limited liability company. During his visit to India in 1937 the assessee started a silk and money-lending business at Karachi. The business was carried on in Fidoo Building, Bunder Road, which is in the jurisdiction of the Income-tax Officer, A Division, Karachi, but after his return to India in 1939, the assessee acquired business premises in Khurshed Building on the opposite side of the same road, but in the jurisdiction of the Income-tax Officer, B Division, Karachi. During his absence, his business interests were looked after by his nephew, Chuhamal, in whose favour he had executed a power of attorney. While in Karachi in 1937, the assessee paid Rs. 23,000 to his brother, Nihalchand, in respect of a house at Bunder Road Extension, which is within the jurisdiction of the Income-tax Officer, A Division, Karachi. For the assessment year, 1938-39, the Income-tax Officer, A Division, issued a notice under S. 22 (2) of the Act and it was served on the assessee on 21st May 1938. In January 1939, the case was transferred to the Income-tax Officer, B Division, as the assessee had acquired business premises in Khurshed Building. On 11th May 1939, he submitted a return declaring an income of Rs. 3638, in respect of interest received from the Yokohama Bank. After some adjournments, the accounts were examined in the office of the Income-tax Officer, B Division, in October 1939. In the following month, the case was transferred to the Income-tax Officer, A Division, on the ground that the assessee was carrying on his business from his residence at Bunder Road Extension. On 17th November 1939, the Income-tax Officer, A Division, wrote a letter to the assessee in which he stated that he would like to discuss certain points with him and to see his account books. The assessee appeared before the Income-tax Officer, A Division, on 8th January 1940, and he made a statement in the course of which he stated that the Karachi business was controlled by him from his residence at Bunder Road Extension. The Income-tax Officer A Division, assessed the appellant on 30th January 1940.

[3] On 18th March 1940, the Income-tax Officer, B Division, issued a notice to the assessee under S. 34 of the Act to submit a further return. The

Income-tax Officer, B Division, did this as he learnt that the assessee was appealing against the assessment made by the Income-tax Officer, A Division, and one of the grounds of appeal was the question of jurisdiction. In such circumstances, it was customary to issue a notice as a precautionary measure, so that in the event of the original assessment being quashed, fresh proceedings may not be time-barred. After receiving the notice, the assessee made a petition to the Commissioner to decide the question whether the Income-tax Officer, B Division, had jurisdiction for the assessment year 1938-39. The Commissioner passed an order on 10th June 1940 under S. 64 (3) of the Act in which he declared Bunder Road Extension to be the principal place of business of the assessee.

[4] The assessee filed appeals against the assessment by the Income tax Officer, A Division. In the appeal against the assessment in respect of the accounting year 1937-38 he contended that the Income-tax Officer, A Division, had no jurisdiction to assess him and that as he was a non-resident, the Income-tax Officer had erred in assessing him in respect of remittances to British India amounting to Rs. 3,90,465. The Appellate Assistant Commissioner rejected these contentions. In the appeal against the assessment in respect of the accounting year 1938-39 he contended that as he was a non-resident the Income-tax officer had erred in assessing him in respect of remittances to British India amounting to Rs. 5,36,847. He further contended that he had been wrongly assessed in respect of Rs. 750 as rental value of the house in Bunder Road Extension as he did not become the owner of it till June 1939, and he had no such income in the accounting year 1938-39. These contentions were rejected by the Appellate Assistant Commissioner.

[5] The assessee made applications to the Commissioner requesting that the assessment be revised in respect of the items mentioned above and, if that was not done, asking him to state a case to this Court. As the Commissioner was not prepared to revise the assessments, he made a reference to this Court stating the case in respect of the assessments for the accounting years 1937-38 and 1938-39, and referring to us the questions set out above.

[6] As regards the first question, the opinion of the Commissioner is that it should be answered in the negative. In view of the fact that on the question whether the assessee was or was not a resident of British India in the two years under consideration, our decision is in favour of the assessee and that our view is that the Income-tax Officer who assessed the assessee for these two years had jurisdiction to assess

him, the first question is of no consequence for the purposes of this case, and we prefer to reserve our opinion on the matter which, we think, involves a careful consideration of recent decisions of the Federal Court and of the Privy Council.

[7] On the second question referred to us by the Commissioner he has given his opinion that the Income-tax Officer, A Division, had jurisdiction to assess the appellant in respect of the assessment for the two years under consideration. We agree with the Commissioner and are of the opinion that on the facts of the case, it is clear that the Income-tax Officer, A Division, had jurisdiction. In the accounting year 1937-38, and also at the time when the original notice of assessment was issued under S. 22 (2) by the Income-tax Officer, A Division, the assessee was carrying on business in Fidoo Building, which is in the jurisdiction of that Officer. On 8th January 1940, three weeks before the assessment was completed, the assessee himself stated that his business was controlled from his residence at Bunder Road Extension, which is admittedly in the jurisdiction of the Income-tax Officer, A Division.

[8] With regard to the assessment proceedings for the year 1939-40, the assessment proceedings were handled throughout by the Income-tax Officer, A Division. A notice under S. 22 (2) of the Act was issued by that officer on 6th November 1939, and the assessee submitted a return on 18th January 1940. On 8th January 1940, the assessee had made a statement that his business was controlled from his residence at Bunder Road Extension in the jurisdiction of that officer. The assessee did not acquire the premises in Khurshed Building in the jurisdiction of the Income-tax Officer, B Division, until after the assessee returned to India in January 1939, and for more than three quarters of the accounting period, the business was carried on at Fidoo Building, in the jurisdiction of the Income-tax Officer, A Division. It is therefore clear that under S. 64 (1) that officer had jurisdiction. Besides, the assessee did not submit a return within the period allowed by the notice, so under the second proviso to S. 64 of the Act, he is precluded from calling in question the place of assessment.

[9] We now come to the third question which is the principal one in this reference. On this, the facts set out in the statement of the case by the Commissioner are that the assessee is a native of India. In 1931 he left with his wife for Java where he remained till 3rd January 1939, except for four months in 1935, when he and his wife were at Karachi, and except for a period from 21st June 1937 to 5th July 1937, i. e., 14

days in the accounting year 1937-38 when he alone visited Karachi. After 3rd January 1939, the assessee has been continuously in British India except for 2 months in the autumn of 1939. While in Karachi in 1937, the assessee paid Rs. 23,000 to his brother, Nihalchand, in respect of a house, at I, Clayton Road, Bunder Road Extension. This house was let out on rent for 2 months in 1937. Thereafter, it was extensively repaired and altered under instructions from the assessee. For this purpose, he remitted sums amounting to Rs. 30,000 to his nephew, Chuhermal, during the years 1937-38. On his return to British India in January 1939, the assessee occupied the house for the first time. In June 1939 a conveyance was executed by which Nihalchand transferred the house to his minor son Pessumal, who had in the meantime been adopted by the assessee. The consideration for the sale-deed is set out to be Rs. 20,000. The Income-tax Officer held, on the facts, that the assessee was resident of British India in the accounting years 1937-38 and 1938-39, and in appeal, these decisions were confirmed by the Assistant Commissioner of Income-tax. The Commissioner's opinion is that under S. 4-A of the Act, according to which an individual is resident in British India in any year:

"if he maintains or has maintained for him a dwelling place in British India for a period or periods amounting in all to 182 days or more in that year, and is in British India for any time in that year."

He was clearly resident in the two accounting years, but that if S. 4-A which was enacted in 1939, is inapplicable for the accounting year 1937-38, still the assessee would be resident because (a) during the accounting year, 1937-38, he spent substantial sums in altering and repairing the house at Bunder Road Extension, (b) although the formal conveyance was not executed until 1939, the assessee treated the house as his own from the time of his visit to Karachi in 1937, and that his brother was really a benamidar for him, (c) the action taken by the assessee in respect of the house, and the starting of his business at Karachi, clearly show that he came to India during the relevant accounting period, not for any casual or temporary purpose but in order to make arrangements for re-establishing himself permanently in this country.

[10] The Commissioner has relied on observations in English cases which we shall consider later. In the first place, there is a misconception by the Commissioner of the term "benami transaction." It is not that when Nihalchand bought the house, consideration proceeded from the assessee and that the real purchaser was the assessee, in which case Nihalchand could be considered a benamidar for the assessee. The

fact that the assessee agreed with Nihalchand to take up the house and paid Rs. 23,000 would not transfer any title to the assessee, without a registered conveyance. An agreement to sell does not convey any title to immovable property and does not constitute the person who receives the price a benamidar of the property for the person who pays the money. Payment of price and even delivery of possession would not convey any title until a registered conveyance is executed.

[11] Mr. Hukumatrai, the learned counsel for the Income-tax Department, has argued that from June 1937 the assessee could be considered the equitable owner of the house as distinguished from the legal owner, Nihalchand. Now it is true, as a general statement that in England a contract for the sale of property makes the promisee the owner in equity of the estate, but in this country the distinction between legal and equitable estates, is not recognized. Section 54, T. P. Act, makes it clear that such a contract in this country does not create any interest in or charge upon the property. A contracting party may have a right to sue for damages for breach of contract or for specific performance, but that is a different thing. The question of ownership however, is not important for the purposes of determining residence for, if a person maintains or has maintained for him a residence he need not be the owner; he may be a tenant only.

[12] Now in the accounting year 1937-38, the assessee was in British India for 14 days during which he stayed, not in this house but in another house, as a guest of his relative. The question is whether he can be considered a resident in British India for that year. Before the amendment in 1939 the term "resident" was not defined in the Act. The definition enacted in S. 4A by the amendment in 1939, could not be applied retrospectively for determining residence in 1937-38, but whether that definition is applied or not, we are clearly of the opinion that on the facts as found by the Commissioner, a legal inference could not be drawn that the assessee was a resident in British India for 1937-38.

[13] The word "reside" is defined in the Oxford English Dictionary as "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place". Can it be said that the assessee resided in British India in 1937-38, when throughout that year he lived with his wife in Java except for a visit to Karachi for 14 days? He had left India with his wife in 1931, and he was away till 3rd January 1939, except for four months in 1935, and 14 days in 1937. It is true that a man may have residence in two places, but an occasional visit will not constitute residence. A man

could, however, be considered resident in a country, if as part of his regular habit of life, he stays in that country in his own establishment or even in hotels for prolonged periods every year spending the rest of the time abroad, but that is not the case here. The then Commissioner of Income tax held the assessee to be a non-resident for the year 1936-37, and cancelled the assessment for that year in respect of remittances to British India. For the years 1937-1938 and 1938-1939, he has been held to be resident and assessed on remittances to British India of Rs. 390,465 and 5,36,847 respectively, and it is this liability which is disputed by the assessee on the ground that he was a non-resident.

[14] In giving his opinion that the assessee was a resident in British India for 1937-38, the Commissioner has stated:

"I submit that in the absence of a definition, the question whether a person should be regarded as resident or not, must depend to a very large extent on the purpose with which he visited the country during the relevant period. Did he come merely for recreation or in connection with a business carried on elsewhere, or did he come with a view to settle permanently in the country?"

[15] It appears to us that there is in this reasoning a confusion between domicile and residence, which are not the same thing. For the purposes of determining domicile, the decisive consideration is whether a person comes to a country with a view to permanently settle in it. The Commissioner and also the learned advocate who has appeared for the Income-tax Department in this reference have relied on certain English cases which we now proceed to consider, though, before doing so, we might state that English decisions have to be applied with caution in the interpretation of the Income tax Act. We might refer to the observations of their Lordships of the Privy Council in *Shaw Wallace and Co. v. Commissioner of Income-tax, Bengal*, reported in 59 I. A. 206 : (A. I. R. (19) 1932 P. C. 138), which read:

"Again their Lordships would discard altogether the case law which has been so painfully evolved in the construction of the English Income-tax Statute—both the cases upon which the High Court relied, and the flood of other decisions which has been let loose in this Board. The Indian Act is not *pari materia*; it is less elaborate in many ways, subject to fewer refinements, and in arrangement and language, it differs greatly from the provisions with which the Courts in this country have had to deal. Under such conditions, their Lordships think that little can be gained by attempting to reason from one to the other."

[16] This warning was repeated in the case of *Kamakshya Narain Singh v. Commissioner of Income-tax, B. & O.*, reported in (1943) 11 I. T. R. 513 : (A. I. R. (30) 1943 P. C. 153), though their Lordships added that on some fundamental concepts reference may to some extent be usefully made to English decisions.

[17] We now proceed to consider these decisions. The first of these is the case of *Levene v. Commissioners of Inland Revenue*, (1927) 137 L. T. R. 66. The passage relied on reads:

"I suggest as a characteristic factor, for consideration even if it does not fulfil the nature of a test, to ascertain if the suggested alternative place of residence is one which the subject seeks willingly and repeatedly in order to obtain rest or refreshment or recreation suitable to his choice; where for a time he is embedded in the enjoyment of which he desired to obtain, and found in the abode of his own option. Another factor may be found and an important one—if he returns to and seeks to his own father land in order to enjoy a sojourn in proximity to his relations and friends."

[18] In that case the appellant, a British subject, gave up the lease of a house in the United Kingdom and lived in hotels in the United Kingdom and abroad from 1919 to 1925, during which period he was in the United Kingdom three to four months every year to visit relations, obtain medical advice, attend to his income-tax matters, take part in religious observances and visit his mother's grave. He was held to be a resident for the fiscal years 1920-21 to 1924-25. That case was decided on facts which bear no similarity to the facts in the present case.

[19] The other case relied on is *Lysaght v. Commissioner of Inland Revenue*, reported in (1929) 13 T. C. 511 : (1928 A. C. 217), where the facts were that a company director sold his house in England and went to live permanently in Ireland. He was a paid advisory director of *Lysaght's Ltd.* and came to England every month to attend directors' meetings and stayed with relatives or at hotels, each visit lasting about a week. He was held to be a resident.

[20] In that case Viscount Sumner observed:

"Setting up an establishment in this country available for residence at any time throughout the year of charge, even though used but little, may be good ground for finding its master resident here."

[21] That observation is relied on by the Commissioner and the learned advocate for the Income-tax Department, but the observation cannot apply to the present case.

[21a] Here the assessee left this country with his wife in 1931 to engage in business at Java and was away for six years, except for a period of 4 months in 1935. For the accounting year 1936-37, his assessment was cancelled by the then Commissioner on the ground that he was a non-resident. When he came to India for 14 days in June 1937, he negotiated for the purchase of his brother's house and paid Rs. 23,000 but the conveyance was not executed till 1939. He occupied the house for the first time in January 1939 when he came to India to settle down. Before he came to live in this house, a large amount was spent on alterations and repairs, in fact a larger amount

than the price paid for the house. It cannot be said that this house was available for occupation "at any time throughout the year of charge," when in fact it was an empty house in which extensive alterations were being made. Even after the alterations were completed, it can hardly be said to be the assessee's "establishment" or "settled or usual place of abode" before he had occupied it, and it could not be said to be available at all times for if the assessee came from abroad he could not come straight to live in it. The house would have to be furnished according to his requirements and taste. If the assessee had lived in this house and after he left maintained it or had it maintained in his absence, and it was available for occupation whenever he chose to come, the case would have been different. Maintaining a residence "and setting up an establishment" are different things from owning or contracting to purchase an unfurnished house. As observed by Lord Sumner in *Lysaght's case*, (1929-13 Tax. Cas. 511 : 1928 A.C. 217) cited above, the word "resident" indicates a personal quality and is not descriptive of a person's property.

[22] In Ex. G, which is referred to by the Commissioner in his reference, there is given a building expenditure account of the assessee which shows that in June 1938 Rs. 15,015 and in September 1938, Rs. 5041 were remitted for construction in respect of this house. There is no evidence that the house was ready for occupation for 182 days in the accounting year 1938-39, but even if it was, having regard to the circumstances set out above, the house could not be considered as the assessee's residence until he occupied it for the first time on 3rd January 1939. Admittedly, the assessee never occupied it in the accounting year 1937-38 and it was therefore not his residence in 1937-38, and in the accounting year 1938-39 it was his residence for about 85 days only. So the assessee could not be considered as resident in the accounting year 1938-39 having regard to the definition given in cl. (ii) of S. 4A of the Act.

[23] We now come to the fourth question referred to us by the Commissioner. The Commissioner has stated that there was ample evidence to justify the conclusion that the assessee was the real owner of the property though the conveyance in his favour was not executed till June 1939. We have in a preceding part of this judgment given our reasons for holding that the assessee was not owner of the property till June 1939 and that Nihalchand could not be considered a benamidar for the assessee. There was no benami transaction at all. On the evidence it could not be inferred that he was the owner.

S. N. D. A. R., J. A. L. L. J.

Vakil High Court,

SRINAGAR (Kashmir)

[24] Our answers to the three questions referred to by the Commissioner in respect of the assessment for the accounting year 1937-38 are respectively : (1) Does not arise. (2) The assessing officer had jurisdiction. (3) In the negative. Our answer to the four questions referred to by the Commissioner in respect of the accounting year 1937-38 are : (1) Does not arise. (2) The assessing officer had jurisdiction. (3) In the negative. (4) In the negative.

[25] We now come to the References Nos. 110 and 111 of 1943 which arise out of the same case stated by the Commissioner. The assessee has contended that the Commissioner should be required to refer to us certain other points of law also in respect of the assessments for the accounting years 1937-38 and 1938-39. It is contended that these law points arise out of the Appellate Commissioner's order. The points which have been taken in the argument are : (a) that the remittances of Rs. 3,90,465 and Rs. 5,36,847 received from Java in the years 1936-37 and 1937-38 were from capital and not profits; (b) that the assessee having been adjudged by the Commissioner to be a non-resident for the years 1936-37, the remittance of Rs. 3,90,465 could not be taken into consideration in assessing the income for the accounting year 1937-38 on a proper interpretation of S. 4 (2) of the Act before the amendment of 1939.

[26] As regards point (a), the Commissioner has observed that the contention is on a question of fact, which was not raised before the Appellate Assistant Commissioner. It might be that in certain circumstances such a question may be a question of law, e. g., if there was a question whether on the evidence such an inference could be arrived at, but in any case as the point was not raised before the Appellate Assistant Commissioner it cannot be raised in an application under S. 66 (2) of the Act : *Commr. of Income-tax v. Sind Light Rly. Co. Ltd.*, 27 S.L.R. 47 : (A.I.R. (19) 1932 Sind 189).

[27] As regards point (b), it was raised before the Appellate Assistant Commissioner and is one of law, but it is conceded by the learned advocate for the assessee that if our finding should be that the assessee was not resident for 1937-38 and 1938-39, the Commissioner need not be required to state a case on this point, as the effect of our finding would be that he would not be liable to pay income-tax for the years 1937-38 and 1938-39 on the two items of remittances referred to above. We therefore see no ground for directing the Commissioner to state a case in respect of these points raised in the two references, Nos. 110 and 111 of 1943. These applications are therefore rejected. There will be no order as to costs on these applications. In the

reference by the Commissioner the assessee will be entitled to his costs and a refund of the reference fee.

R.G.D.

Reference answered.

A. I. R. (36) 1949 Sind 34 [C. N. 12.]

TYABJI C. J.

Noor Mahomed Walimahomed—Appellant v. Dhirasingh Jagatsing and others—Respondents.

Civil Misc. Appeals Nos. 41 and 42 of 1945, Decided on 29th January 1948, from order of Dist. Judge, Hyderabad.

T. P. Act (1882), S. 117 — "Agricultural purposes" — Tests indicated — Primary object must be cultivation — Contract of lease between zamindar and zamindar — Lease transferring zamindari and jagirdari right — Primary object not cultivation — Lease held not for agricultural purposes.

Before it can be held that the lease is saved by the provisions of S. 117, it must be shown that it is a lease for agricultural purposes. The mere fact that the lease relates to agricultural land does not make it a lease for agricultural purposes, unless the primary object of the lease is cultivation or agriculture.

[Paras 3 and 4]

Where the effect of the lease was to transfer to the lessee certain rights which the lessor exercised as a zamindar and jagirdar and the lease was a contract between the zamindar and zamindar regarding zamindari rights and not a contract between zamindar and a cultivator, or a cultivator and cultivator for agricultural purposes, that is to say, for the purpose of actually cultivating the land, setting out the terms on which the cultivator was to cultivate and occupy the land for the purposes of cultivation, the lease could not be said to be one, the primary object of which was cultivation, that is, the lease could not be held to be one for agricultural purposes. Such a lease is not saved by S. 117 from the operation of the Transfer of Property Act : A. I. R. (13) 1926 All. 432, *Rel. on.* [Para 4]

Annotation: ('45-Com.), T. P. Act, S. 117, N. 3.

In No. 41 of 1945.

Harchand Rai & Co. — for Appellants.

J. I. Gidvani — for Respondents (Nos. 1 and 2).

In No. 42 of 1945.

Harchand Rai & Co. — for Appellants.

Hotchand Gopaldas — for Respondents.

Judgment.—In these two appeals, the same point is involved, and the question is whether the lease on which the claims made against the appellants were based was a valid lease in law. This lease was executed by Mir Sahib Mir Mian Budhokhan Sahib, a jagirdar to Tando Muhammad Khan, in favour of the respondents. The lease related to lands in some of which the lessor had only the rights of a jagirdar, the lessor also had zamindari rights. Some of these lands were cultivated by *Mourusi* haris. Under the terms of the lease, the respondents stepped into the shoes of the lessor as jagirdar and zamindar for the period of the lease. The respondents were to receive all the dues receivable from the cultivators by the lessor as zamindar or as jagirdar, to make the necessary arrangements for the

maintenance of the watercourses in order and for providing the lands with water, to pay whatever was payable to Government either by way of assessment or expenses incurred on repairs of the water channels, and the respondents were also to get the lands cultivated by *haris*. Clause (10) of the lease is:

"That lessee will get cultivated land from his *haris* at his will. It is in hands of lessee to keep or dismiss *haris*."

This lease was only executed by the lessor, and not by the lessee. The Subordinate Judge of Mirpurkhas dismissed the suit filed by the respondents against the appellants for sums alleged to be due under the lease, on the ground that as the lease was not "executed by both the lessor and the lessee" as required by S. 107, T. P. Act, the lease was not a valid lease.

[2] On appeal, the District Judge of Hyderabad remanded the suit holding that the lease was a valid one. The relevant portion of the judgment of the learned District Judge is as follows:

"Lastly it is urged by Mr. Thakurdas that the lease in question is not an agricultural lease. I have carefully gone through the lease and am of opinion that this is an agricultural lease and not a non agricultural lease. The lease relates to agricultural lands. It specifies the canals from which water is received for cultivation of these lands. It recites that Government dues shall be paid by the lessee, that if there is any new settlement (i. e., revision of assessment) the lessor is not bound to pay it. It recites that the produce of the *jaghiri* rights shall be taken by the lessee and not the lessor, that expenses incurred in digging and other agricultural operations shall be borne by the lessee, that the lessee is to get lands cultivated by his *haris* according to his will and that he may increase the *batai* assessment payable by tenants but not reduce them. In my opinion this is clearly an agricultural lease and not a non-agricultural lease."

And he came to the conclusion that the lease was saved by the provisions of S. 117, T. P. Act.

[3] Now before it can be held that the lease was saved, and was valid by reason of S. 117, T. P. Act, it is necessary to show that the lease was a lease "for agricultural purposes." It is pointed out that the undoubted fact that the lease related to agricultural land did not make the lease a "lease for agricultural purposes."

[4] Mr. Manghanmal who appears for the appellants has referred to the case of *Ballabh Das v. Murat Narain Singh and others*, 48 ALL. 385; (A. I. R. (13) 1926 ALL. 432), in which Sulaiman J. had to consider the meaning of the words "a lease for agricultural purposes," and stated:

"It is, therefore, important to consider whether the lease in question was or was not a lease for agricultural purposes. If it was not a lease for agricultural purposes, then it would be governed by the Transfer of Property Act and not by the Agra Tenancy Act. . . . The expression 'agricultural purposes' has not been defined anywhere, but a lease cannot be called a lease for agricultural purposes

unless the primary object of the lease is cultivation or agriculture. It is, therefore, necessary to examine the terms of the lease. The lease itself is called a *zar-i-peshgi* lease in perpetuity. The entire village is leased to the lessee who is put in possession thereof and authorised to let out land to tenants and make collections. Clause (3) of the lease provides that the lessee will be entitled to all the income, produce, *mal* and profit arising from *mal*, *sairitem*s, *sir* land, high and low lands, water and forest produce, tanks and ponds, groves, markets, *baras* (enclosures), land on the banks of the Ganges which may appear or disappear by fluvial action of the river. Although the power of the lessee is described in detail, there is no express mention that he is to cultivate the lands himself. No doubt such power would be implied, but the point is that there is no express mention of any intention on the part of the lessee to cultivate the lands himself. . . . The lessee is not entitled to plant groves on the land. The lessee is also to be responsible for payment of Government revenue and cesses. Reading the lease as a whole, therefore, it is impossible to say that the primary object of this transaction was agriculture, that is to say, that the entire village was let out to Kalka Prasad Singh for the purposes of cultivation or other agricultural purposes. Part of the village consists of waste and *abadi* lands and it was not likely that all the area could be brought under cultivation. Having regard to all these circumstances, it is impossible to hold that the lease in dispute in this case was a lease for agricultural purposes. . . ."

The effect of the lease in this case was to transfer to the respondents certain rights which the lessor exercised as a *zamindar* and *jagirdar*. This was a contract between a *zamindar* and a *zamindar* regarding *zamindari* rights and not a contract between *zamindar* and a cultivator, or a cultivator and cultivator for agricultural purposes, that is to say, for the purpose of actually cultivating the land, setting out the terms on which the cultivator was to cultivate and occupy the land for the purposes of cultivation. The decision of the Subordinate Judge, therefore, appears to be correct, and the decision of the learned District Judge did not deal with the actual point which was in issue.

[5] I accordingly allow these appeals and restore the judgments of the trial Court dismissing the suits. The appellants will have their costs throughout.

R.G.D.

Appeals allowed.

A. I. R. (36) 1949 Sind 35 [C. N. 13.]

THADANI AND CONSTANTINE JJ.

Mulchand Udhoomal—Appellant v. Bherumal Kanomal and others—Respondents.

First Appeals Nos. 60 of 1942 and 1 of 1943, Decided on 6th November 1947.

Partnership Act (1932), S. 48—A and B holding 9 annas share together and other partners 7 annas separately—Dissolution of partnership and suit for accounts—Shares of A and B equally separated—A found entitled to receive certain amount from other partners who were not in position to pay—Loss resulting held could not be thrown equally on B.

Partnership was formed of shah and gumashta partners. A and B who were shah partners, had together 9 annas shares and the gumasta partners had 7 annas shares which were sub-divided between them. On the dissolution of partnership accounts were taken on the basis that each partner including the shah partners held their shares separately. It was found that A had to take certain amount from the gumasta partners who were men of straw. Shares of A and B were equally separated for purposes of account. It was contended by A that in order to have equality between two shah partners (A and B) it must be provided that if A failed to recover from the gumashta partners, the loss should be borne by A and B equally.

Held that it could not be done: (1904) 1 Ch. 57, Rel. on. [Para 3]

Annotation: ('46-Man) Partnership Act, S. 48 N. 2, 7.

Lulla and Co.—for Appellants.

Lalchand and Co.—for Respondent (No. 1).

Constantine J.—The appellant, Mulchand, who is represented by the Court of Wards, is the minor son of one Udhomal, who was together with the respondent, Bherumal, a shah partner in a firm. After the death of Udhomal a suit was filed by the appellant for partnership accounts, in which Bherumal and the gumasta partners were joined. A preliminary decree was passed and then reference to the Commissioner was made. Both Mulchand and Bherumal filed objections to the Commissioner's report. The matter was disposed of by the learned Judge, and from his judgment we have this appeal as well as the connected appeal by Bherumal.

[2] In Mulchand's appeal the point briefly is that the final decree gives to the plaintiff sums from Bherumal and from defendants 2, 3 and 4, who were the gumashta partners. It is argued by Mr. Lulla that these gumashta partners are men of straw and hence the risk that they will not be able to reimburse Mulchand should be borne by Bherumal the other shah partner also. The partnership deed showed that Bherumal and Udhomal were to have a share together of nine annas and the gumashta partners were to have a share of seven annas. Clause 10, which contains this provision, also sub-divides the seven annas share of the gumashta partners, but contains no sub-division of the share of the shah partners. But the preliminary decree itself directed that accounts should be taken on the basis that the shares of Udhomal and defendant No. 1 were separate, and hence we do not think that reliance can be placed upon Clause 10 in order to support an argument that the correct way of working out the accounts would have been to work the liability of the gumashta partners as against the shah partners jointly.

[3] Mr. Lulla also argued that in order to have equality between the two shah partners, there must be some clause whereby if Mulchand failed to recover from the gumashta partners,

then that failure should become a loss to be borne not merely by him but by Bherumal also. We think, however, that that is not possible. Carrying this principle to its logical conclusion, if you have a firm with several partners, the permutations and combinations to this effect would be astronomical.

[4] Mr. Keshowdas has cited *Garner v. Murray*, (1904) 1 Ch. 57 : (73 L. J. Ch. 66), there is an observation in that case with reference to S. 44 of the English Act corresponding to S. 48, Indian Partnership Act:

"I do not find anything in that section to make a solvent partner liable to contribute for an insolvent partner who fails to pay his share."

[5] For these reasons, therefore, the appeal of Mulchand should be dismissed.

[6] In the companion appeal by Bherumal no point of principle is involved.

[7] The result is that both the appeals are dismissed with costs.

R.G.D.

Appeals dismissed.

A. I. R. (36) 1949 Sind 36 [C. N. 14.]

THADANI AND CONSTANTINE JJ.

Municipal Corporation of Karachi — Appellants v. Mooshboy Karimji and Sons—Respondent.

First Appeal No. 43 of 1945, Decided on 17th March 1948.

Bombay District Municipal Act (III [3] of 1901), S. 70 (1)—Municipality can charge annual recurring fee for construction of balcony overhanging on public street — "Putting up" in S. 70 (1) includes "keeping up" — Municipality is entitled to revise and enhance fees every three years, even in case of constructions standing from before 1929 — Rules under S. 46 (i) — Karachi Municipal Rules and Bye-laws, Appendix G, Schedule of fees, Cl. (c) and its amendment in 1929 are not ultra vires — Bombay District Municipal Act (III [3] of 1901), Ss. 113 and 46 — Karachi Municipal Rules and Bye-laws, Appendix G, Schedule of Fees, Cl. (c).

Under S. 113 read with S. 70 (1), Bombay District Municipal Act, the Municipality is empowered to charge an annual fee for permission to put up a balcony overhanging on public street. The words "putting up" in S. 70 (1), do not refer to a single act, but have been used as a compendious expression for "putting up and keeping up". The Municipality can therefore charge annual recurring fee for the construction. Clause (c) of Schedule of fees in Appendix G, of the Karachi Municipal Rules and Bye-laws made under S. 46 (i) is not therefore ultra vires: A. I. R. (35) 1948 Sind 4, *Disting.*

[Paras 12 and 13]

Similarly, the municipality is entitled to revise and enhance the amount of fee every three years. Amendment made in 1929 to the Appendix G, by which the market value was to be fixed by the Managing Committee every three years, and the balconies already in existence were to be charged with those rates after the lapse of the first period of three years, is not ultra vires.

[Paras 10 and 17]

In case of constructions standing from before the amendment, no contract can be said to exist between the owner and the Municipality. It is true that the original person to whom permission was given endorsed

upon the permission that he would abide by its terms. But the Act speaks of giving permission, and authorizes the Municipality to levy fees, and to provide for fees by rules. The legal effect and consequence of the permission is governed by the Act and not by the law of contract. Section 46 states that the Municipality may from time to time alter or rescind rules, but not so as to render them inconsistent with the Act. Hence a clause in a permission that annual fees would be payable in advance does not forbid re-assessment of market value by the Committee, or lead the grantees to believe that the fees would never be enhanced if the market value rose. [Paras 17 and 18]

Constantine J.— In 1914, the plaintiffs were granted permission to put up a balcony by the Municipal Corporation of the City of Karachi, in exercise of its powers under the Bombay District Municipal Act, then in force. In about 1942 the Municipal Corporation sought to revise the annual fee imposed in the permission; hence the suit by the plaintiffs.

[2] The plaint proceeded on the ground that the permission constituted a contract, but it appears from the judgment that during the course of the trial, the learned Judge was of the opinion that the levying of an annual fee for permission to put up a balcony, was *ultra vires* of the Act, and that both sides proceeded to deal with this view of the case, and the arguments before us proceeded mainly on this point.

[3] Two main questions arise for determination:

(1) Whether under the District Municipal Act, the Municipality was empowered to charge an annual fee for permission to put up a balcony; and

(2) if so whether the Municipality is at liberty to enhance the amount of the fee.

[4] Our decisions on both the points are in the affirmative. Section 113, District Municipal Act, empowers the Municipality to give

"written permission to the owners or occupiers of buildings in public streets to put up verandahs, balconies or rooms ... to project from any upper storey thereof ..."

[5] Section 70(1) states:

"When permission is given ... for putting up any projection ... the Municipality may charge a fee for such ... permission."

[6] Section 46 provides that the Municipality may make or may from time to time alter or rescind rules in respect of various matters and clause (i) of S. 46, refers to:

"... the fees to be charged for ... permission granted under S. 70(1) and the times at which and the mode in which the same shall be levied or recovered and shall be payable ..."

[7] Rules made under S. 46 (i) are contained in Appendix G of the Karachi Municipal Rules and bye-laws.

[8] Clause (c) of the Schedule of fees in the Appendix G is as under:

<p>"Permission to put up open verandahs or balconies projecting from buildings."</p>	<p>An annual fee of 4 p. c. on the market value to be fixed by the Managing Committee in their sole discretion of the ground covered by such open verandah or balcony"</p>
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[9] Accordingly in 1914, the plaintiffs' predecessor-in title was issued a permission the relevant clause of which is that the annual fees payable for the balcony under Appendix (1) of the Municipal Rules, will be paid in advance each year. The Appendix referred to is Appendix G quoted above.

[10] The next stage is that in 1929 an amendment to Appendix G was made by which the market value was to be fixed by the Managing Committee every three years, and the balconies already in existence were to be charged with those rates after the lapse of the first period of three years.

[11] Then some considerable correspondence ensued between the Municipality and the plaintiffs in which the Municipality appeared to change its view from time to time on the question whether it had the power to enhance the fees.

[12] The learned trial Judge was of the opinion that the words "putting up" referred to a single act, and did not include by implication "keeping up", and that annual fees involved a conception of levying fees for the continued use of a projection and were therefore *ultra vires*.

[13] We think this view of the matter is not correct. If the argument that merely "putting up", as opposed to "keeping up" were intended by the Act, were carried to its farthest conclusion, the result would be absurd. The very next day after a balcony was once constructed the Municipality would be able to treat it as a nuisance or trespass; for the permission according to the argument does not extend to keeping up the balcony. The truth is that the words "put up" have been used in the Act, as a compendious expression for "putting up and keeping up". It is to be observed that in sub-s. (2) of S. 113 putting up a balcony without permission may be punished with further fine for every day on which he continues to fail or neglect to remove the balcony, if once convicted under this section.

[14] We were referred in this connection to the judgment of Constantine J. in *Alcock Ashdown and Co. Ltd. v. Municipal Corporation of Karachi*, reported in A. I. R. (35) 1948 Sind 4 in which it was held that the Municipality was not empowered to charge a recurring annual fee for newly establishing a factory. That case is distinguishable, because the establishing of a factory is an act permitted by the general law whereas the erection of a balcony over land belonging to another without his consent is actionable; and secondly, because the Municipal Act in one section dealt with newly establishing factories, while in another section it dealt with carrying on trades.

[15] In this case there is no reference to any continuing act by way of differentiation. The learned Judge contrasted the "use" in sub-s. (2) of S. 70, with the words "putting up" in sub-s. (1); but the "use" referred to is the use of markets and slaughter houses which belong to the Municipality.

[16] The learned Judge was inclined to think that there was no reasonable justification for levying an annual fee based on the market value of the land, as the land was still in use as a road, and the Municipality had not been deprived of the use of it, and the value of it in no way had been diminished, and they had suffered no loss by the existence of the balcony. The Municipality, however, as a trustee and owner of Municipal lands, like any other owner, is presumably at liberty to recover payment for parting with any of its proprietary rights. When the Legislature provided that the Municipality should be entitled to recover fees from the owners of building who put up projections over Municipal lands, the reason for this appears to be not so much that they put up a projection, but because in keeping up the projection they make use of Municipal land.

[17] The next question is whether the Municipality was entitled to revise the fees. The learned Judge held that no contract existed between the parties, and we think that, that is correct, since the permission was granted in exercise of the powers granted by the Act. It is true that the original person to whom permission was given endorsed upon the permission that he would abide by its terms. But the Act speaks of giving permission, and authorizes the Municipality to levy fees, and to provide for fees by rules. The legal effect and consequence of the permission is governed by the Act and not by the law of contract. Section 46 states that the Municipality may from time to time alter or rescind rules, but not so as to render them inconsistent with the Act.

[18] Clause (3) of the permission has been quoted above. The annual fees under the Appendix were to be 4 p.c. of the market value to be fixed by the Managing Committee. Market value is a thing which fluctuates, and we think that clause (3) did not forbid re-assessment of market value by the Committee, or lead the grantees to believe that the fees would never be enhanced if the market value rose. Thus the alteration of the rules was reasonable in its application to existing permissions.

[19] The judgment with which we have dealt occurred in S. No. 33/43; in the suit now under appeal the order was that it had been agreed by all the advocates concerned that the judgment in S. No. 33/43 would cover the judgment in

connected suits. The appeal in S. No. 33/43 itself has been settled, and this appellate judgment, therefore, will apply to the appeal in suits Nos. 138/43, 139/43, 140/43, 141/43, 188/43, 189/43, 105/43 and 96/43.

[20] The result is that the appeals are allowed with costs, the decrees in the above suits set aside, and the suits dismissed with costs.

R.G.D.

Appeal allowed.

*** A. I. R. (36) 1949 Sind 38 [C. N. 15.]**

TYABJI C. J. AND MEHER J.

Noor Mahomed s/o Sulleman — Appellant v. Mt. Sardar Khatun w/o Moula Bux and others—Respondents.

First Appeal No. 31 of 1942. Decided on 22nd October 1947, from judgment and decree of Sub-Judge, Sukkur, D/- 30th April 1942.

(a) Interpretation of statutes—Plain words without any ambiguity — Construction should be strict and without importing any words which are not there.

When the enacted words are all plain words with well-defined meanings, entirely free from any ambiguity of any kind, or any difficulty created by any conflict or inconsistency in the words enacted, it is necessary to keep very strictly to the actual words of the statute, and to the strict grammatical meaning of the words, and the tendency to import into the words what is not there or to otherwise depart from the words is to be strongly deprecated: A. I. R. (30) 1943 F. C. 36, A. I. R. (5) 1918 P. C. 352, A. I. R. (19) 1932 P. C. 165, A. I. R. (26) 1939 P. C. 47 and A. I. R. (32) 1945 P. C. 48, *Rel. on.* [Para 5]

✱ (b) Provident Funds Act (1925), S. 5—Nominee has nothing more than right to receive amount — Nominee does not get absolute title to it.

In every case the right conferred by the Act upon the nominee, whether the nominee be a dependant or not, is the "right to receive" the amount deposited in the Provident Fund by the subscriber, nothing more and nothing less, although it is enacted that the nomination shall be deemed to confer such right absolutely, notwithstanding anything contained in any law or any disposition made by the subscriber. The use of the word "absolutely" has not the effect of conferring on the nominee a title to the exclusive ownership of the deposit. The words "notwithstanding anything contained in any law for the time being in force or any disposition whether testamentary or otherwise" constitute a protective provision, having the effect of protecting the specified right conferred, viz., the right to receive the sum, and of making it indefeasible by enacting that no one else shall be in a position to challenge the right of the nominee to receive the sum, even though he may be able to show that he had a better or superior title to the sum under the law or by reason of a disposition made by the subscriber. But the right to receive is subject to the rights of others under the law or arising out of any disposition made by the subscriber. Where a nomination has once been duly made, the Act is not concerned with the question, who is ultimately entitled to the sum, but only designates the person to whom the payment has to be made. As to who is entitled to the sum which the nominee receives, one has to take into consideration not only the nomination but also all other relevant facts and apply not only the Provident Funds Act but all other relevant law applicable to the case.

"Right to receive" is not equivalent to "right to receive beneficially": A. I. R. (11) 1924 Sind 57; A. I. R. (22) 1935 Sind 73 and A. I. R. (26) 1939 Sind 107, *Foll.*; A. I. R. (7) 1920 Cal. 305; A. I. R. (15) 1928 Lah. 773 and A. I. R. (24) 1937 All. 562, *Rel. on.*; A. I. R. (19) 1932 Sind 115; A. I. R. (21) 1934 Mad. 173; A. I. R. (22) 1935 Bom. 234 and A. I. R. (23) 1936 Oudh 32 (F. B.), *Dissent.*; A. I. R. (26) 1939 Cal. 642 and A. I. R. (34) 1947 Cal. 176, *Ref.* [Paras 4, 6]

Annotation: ('46 Man) Provident Funds Act, S. 5 N. 1.

*(c) Provident Funds Act (1925), S. 3 (2)—"Vest"—Meaning indicated—Only immediate right to possession is conferred, without affecting beneficial rights of actual owners, whoever they may be, either as heirs or legatees.

Vesting in relation to property means the acquisition of the legal right of immediate possession and dominion over property. It means nothing more. The words, "the sum shall vest in the nominee," do not connote anything more than that in law the legal right to immediate possession of and dominion over the property shall pass from the trustees of the fund to the nominee, and do not mean that the full rights of ownership, including the right to the beneficial enjoyment of the property, shall pass to the nominee. The nominee becomes entitled to possession of the sum without having to obtain letters of administration or a succession certificate. A property may vest in one person, and the beneficial right of enjoying the property as an owner may at the same time vest in another person. The effect of the provident fund vesting in the nominee, when the nominee is a dependant, is therefore quite clear. It confers on the nominee the immediate right to possession and dominion over the amount, without in any manner affecting the beneficial rights of the actual owners, whoever they may be, either as heirs or legatees. Of course, if the dependant nominee happens to be the only heir or legatee, and is therefore also entitled to the beneficial rights in the sum, the entire rights of ownership would vest in him. When this is the case, the dependant's rights are conferred on him, not only by the Provident Funds Act, but by the entire law applicable to the case. The words "shall vest" cannot be construed as "shall vest as the property of the dependant". [Paras 7, 8, 21]

Annotation: ('46-Man) Provident Funds Act, S. 3 N. 3.

G. Raymond—for Appellant.

Fatehchand Assudomal—for Respondents.

Tyabji C. J.—This is a first appeal against the judgment and decree passed on 30th April 1942 by the First Class Sub-Judge of Sukkur in a partition suit. One Moulabux son of Mato, an employee of the North Western Railway, died in 1940, leaving property which included a sum of Rs. 5,000 standing to his credit in the Railway Provident Fund. He left him surviving two widows (plaintiff and defendant 1), two daughters (defendants 2 and 3), a mother (defendant 4), and two sisters (defendants 5 and 6) as his heirs. The appellant, who was defendant 7 in the suit, is a sister's son of Moulabux. He was the only near male relation of Moulabux, and Moulabux had nominated him as his nominee to receive the Provident Fund. After the death of Moulabux, the appellant claimed the sum as his property, while the heirs of Moulabux claimed that they were entitled to it under the Muhammedan

law. In consequence, this suit was filed by Mt. Sardarkhatun, one of the widows, for partition of the properties left by Moulabux, including the Rs. 5,000 in the Provident Fund. The appellant was also interested as defendants 8 to 13, in some immovable property left by Moulabux sought to be partitioned. One of the reliefs sought was an injunction against the appellant, restraining him from recovering the Rs. 5,000 from the Railway, and issue No. 2 framed in the suit was :

"Does the amount of Rs. 5,000 mentioned in schedule C filed with the plaint form part of the property of the deceased?"

The appellant based his claim to the Provident Fund on the nomination, and the question depended entirely upon the right conferred upon the appellant as a nominee, by S. 5, Provident Funds Act of 1925. The learned First Class Sub-Judge found that there was a conflict between the decisions cited before him, namely, *Ahmed Abdul Razzak and ors. v. Jamala Bint Mehdi*, 59 Bom. 475 : (A. I. R. (22) 1935 Bom. 234), *M. Mon Singh v. Mothi Bai*, 59 Mad. 855 : (A. I. R. (23) 1936 Mad. 477); and *In the Goods of Stanley Austin Cardigan Martin*, A. I. R. (26) 1939 Cal. 642 : (187 I. C. 886), on the one hand, and *Hayatuddin v. Mt. Rahiman and another*, A. I. R. (22) 1935 Sind 73 : (159 I. C. 427), on the other, and considering himself bound by the Sind decision decided against the appellant. As a result he passed a decree granting a perpetual injunction against the appellant restraining him from recovering the amount from the railway, and also ordered the Official Commissioner, appointed, to effect the partition, to recover the amount, and divide it among the heirs. It is only these orders that the appellant now seeks to attack in this appeal, claiming that under the Provident Funds Act the sum in the Provident Fund had not only to be paid to him, but became his property on the death of Moulabux by reason of the nomination, and that the heirs of Moulabux were, therefore, not entitled to it.

[2] The question raised before us is covered by earlier Sind decisions, and the decision in *Aimai Shewakshaw v. Awabai Dhanjishah and others*, 18 S. L. R. 311 : (A. I. R. (11) 1924 Sind 57), which is against the appellant, though made in 1923 under the old Provident Funds Act of 1897, was held to be still applicable and binding in *Hayatuddin v. Mt. Rahiman and another*, A. I. R. (22) 1935 Sind 73 : (159 I. C. 427) and *Mt. Latifanbai w/o Abidali Pirali v. Sakinabai w/o Ghulam Hussain and others* I. L. R. (1939) Kar. 432 : (A. I. R. (26) 1939 Sind 107). In the last mentioned case, which was a decision of a Bench of this Court, before

it became a Chief Court, it was stated by Davis, J. C. :

"Now, the question as to whether the monies to the credit of the employee in a Provident Fund are the property of the employee or part of his estate appears to have been decided by a Bench of this Court in *Aimai Shewakshah v. Awabai Dhanjishah and others*, 18 S. L. R. 311 : (A. I. R. (11) 1924 Sind 57), which decision is not only binding on us but with which decision we respectfully agree."

As we are of the view that that case was correctly decided and is still applicable, it would have been unnecessary to consider this matter at any great length and to examine the position afresh but for the fact that Mr. Raymond, who appears on behalf of the appellant, has very strenuously contended that that decision could no longer be regarded as good law. We were pressed to re-examine the whole position and take a different view in view of the fact that there are numerous decisions of other High Courts in which a different and a contrary view has been taken.

[3] We are here concerned with the rights conferred by the Provident Funds Act, 1925, upon nominees. A nomination under the Rules of the Railway Provident Fund is made in the form of a mandatory order to pay as follows :

"I hereby direct that the amount at my credit in my account No. of the State Railway Provident Fund at the time of my death, not including the special contribution admissible under Rule 1314 of the State Railway Provident Fund Rules, 1940, shall be paid to the following person/persons (in the manner shown against their names).

1	2	3	4
Name and address of the nominee or nominees	Nominee's relationship, if any, with the subscriber	Age of nominee	Amount or share of accumulation in the Fund to be paid to the nominee

Where a nomination has been "duly made in accordance with the Rules of the Fund, which purports to confer upon any person the right to receive the whole or any part of sum on the death of the subscriber or depositor" clause (1) of S. 5 enacts that the nomination "shall be deemed to confer such right absolutely" and "notwithstanding anything contained in any law for the time being in force, or any disposition, whether testamentary or otherwise" by the subscriber. With regard to the protection from the rights of creditors and assignees, afforded by the Act when the sum becomes payable on the death of the subscriber, a distinction is made between

three classes among the nominees : (1) In every case, cl. (1) of S. 3 enacts that the sum remains unaffected by any assignment or charge made after the commencement of the Act and free from the liability to attachment under any decree or order of any Civil, Revenue or Criminal Court in respect of any debt or liability incurred by the subscriber or depositor, and neither the official assignee nor any receiver appointed under the Provincial Insolvency Act, 1920, is entitled to any claim to it. (2) When the nominee happens to be a dependant (as defined in cl. (c) of S. 2) it is further enacted by cl. (2) of S. 3 that the sum vests in the dependant on the death of the subscriber, and is free, not only from any debt or liability incurred by the deceased, but even from any debt or liability incurred by the dependant before the death of the subscriber or depositor. (3) When the nominee is a widow or child the sum received is further free even from the rights of assignees on assignments made before the commencement of the Act.

[4] In every case the right conferred by the Act upon the nominee, whether the nominee be a dependant or not, is the "right to receive" the amount, nothing more and nothing less, although it is enacted that the nomination shall be deemed to confer such right absolutely, notwithstanding anything contained in any law or any disposition made by the subscriber. The distinction made between the different classes of nominees is a distinction with regard to the degree and extent of protection afforded against the rights of creditors and assignees. Even where the nominee is a dependant and the sum payable to the nominee vests in the nominee, thereby conferring on the nominee an immediate right to possession of and dominion over the sum and divesting the trustees of the Fund of the right to hold the sum as trustees, it is clear that the vesting is made the means for enabling the dependant nominee to obtain immediate possession of the sum, and for better securing the sum received from the debts and liabilities incurred, by the deceased or by the dependant nominee, before the death of the subscriber.

[5] The enacted words are all plain words with well-defined meanings, entirely free from any ambiguity of any kind, or any difficulty created by any conflict or inconsistency in the words enacted. In such a case, the necessity of keeping very strictly to the actual words of the statute, to the strict grammatical meaning of the words, has been emphasised by the Privy Council over and over again, and the tendency to import into the words what is not there or to otherwise depart from the words has been consistently and strongly deprecated. A long list

of such citations is given by Rowland J. in his judgment in *Emperor v. Benori Lal Sarma*, I. L. R. (1943) Kar. (F. C.) 48 at pp. 77-78 : (A. I. R. (30) 1943 F. C. 36 : 45 Cr. L. J. 1). In *Australian Alliance Assurance Co. v. Attorney-General of Queensland*, A. I. R. (5) 1918 P. C. 352 : (1917 A. C. 537), at p. 354 it was said:

"Their Lordships are not concerned with the policy of the Act nor can they find in the novelty of the provision or in the language of other parts of the Act sufficient ground for disregarding the plain words of the enactment."

In *Nagendra Nath Dey v. Suresh Chandra Dey*, 59 I. A. 283 : (A. I. R. (19) 1932 P. C. 165), it was said :

"In construing such provision equitable considerations are out of place and the strict grammatical meaning of the words is the only safe guide."

In *Pakalanarayana Smami v. Emperor*, 18 Pat. 234 : (A. I. R. (26) 1939 P. C. 47 : 40 Cr. L. J. 364), at p. 248 it was said:

"But in truth when the meaning of words is plain, it is not the duty of Courts to busy themselves with supposed intentions."

In *Emperor v. Benori Lal Sarma*, A. I. R. (32) 1945 P. C. 48 : (46 Cr. L. J. 589), Viscount Simon L. C. said:

"Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results, injurious, or otherwise, which may follow from giving effect to the language used."

It seems to us that if one holds fast to the method enjoined and is only concerned with giving effect to the language used, to the plain grammatical meaning of the enacted words, the question before us presents no difficulty at all.

[6] Mr. Raymond contended that as it is enacted that "any nomination duly made shall be deemed to confer such right (to receive) absolutely" the use of the word "absolutely" had the effect of conferring on the nominee not only the right to receive the sum, but also a title to the exclusive ownership thereof. We are wholly unable to see how a particular specified right, when conferred absolutely, can be regarded as being anything more or less than the particular specified right, and such a construction appears to us to involve a clear departure from the enacted words and to be prohibited by the plain grammatical meaning of the words enacted. It appears to us to be equally impossible to regard the words : "notwithstanding anything contained in any law for the time being in force or any disposition whether testamentary or otherwise" as in any manner supporting Mr. Raymond's contention. These words constitute a protective provision, having the effect of protecting the specified right con-

viz., the right to receive the sum, and of making it indefeasible by enacting that no one else shall be in a position to challenge the right

of the nominee to receive the sum, even though he may be able to show that he had a better or superior title to the sum, under the law or by reason of a disposition made by the subscriber. These words, according to their plain grammatical meaning, do not affect the rights or titles of either the nominee or of others, except in so far as they prevent any one, other than the nominee, from claiming a prior or superior right to receive the payment. Such competition is rendered unsustainable. But the right to receive is subject to the rights of others under the law or arising out of any disposition made by the subscriber. Where a nomination has once been duly made, the Act is not concerned with the question, who is ultimately entitled to the sum, but only designates the person to whom the payment has to be made. Words conferring anything more on the nominee, which could so easily have been used, have been studiously avoided, and in our view the enacted words make it as plain as any words could have made that the Act confers on the nominee nothing more than the right to receive the sum. It is therefore as irrelevant to look to the Act for an answer to the question, who is entitled to the sum which the nominee receives, as it would be to look to the law relating to banking for an answer to the question, who was entitled to the sum which was received from a bank on a cheque. Such a question must be answered by taking into consideration not only the nomination but also all other relevant facts, and by applying not only the Provident Funds Act but all other relevant law applicable to the case.

[7] Mr. Raymond argues that the words of cl. (2) of S. 3, which enact that the sum payable to the nominee when a dependant, shall vest in the dependant on the death of the subscriber, supported his contention. The argument was that when the nominee was not a dependant, the nominee only became entitled to the sum, but when the nominee was a dependant, the sum vested in the nominee as a full owner of the sum on the death of the subscriber. The argument implies that there could be no vesting unless the person in whom the sum vested was entitled to the full rights of an owner in the sum. The construction suggested again appears to us to depart from and to go beyond the plain meaning of the enacted words. The word "vest" has a very well defined meaning. Vesting in relation to property means the acquisition of the legal right of immediate possession and dominion over property. It means nothing more. One speaks of a property vesting in an executor, a trustee, an official assignee or an owner of a property, from the moment when the individual in question acquires the legal right of possession

and dominion. The words, "the sum shall vest in the nominee," do not connote anything more than that in law the legal right to immediate possession of and dominion over the property shall pass from the trustees of the fund to the nominee, and do not mean that the full rights of ownership, including the right to the beneficial enjoyment of the property, shall pass to the nominee. The nominee becomes entitled to possession of the sum without having to obtain letters of administration or a succession certificate. A property may vest in one person, and the beneficial right of enjoying the property as an owner may at the same time vest in another person. The division of the full rights of ownership into the right to possession and dominion, and the right to the beneficial enjoyment of the property is one which is well recognized. Where an executor is appointed by a will, the estate vests in the executor while the beneficial interests vest in the legatees, on the death of the testator. One very important result of an interest vesting in a person is that the vested interest becomes heritable, divisible and transferable: *Soorjmoney v. Dinobundoo*, 9 M. I. A. 129 : (1 Sar. 837). The effect of the provident fund vesting in the nominee, when the nominee is a dependant, is therefore quite clear. It confers on the nominee the immediate right to possession and dominion over the amount, without in any manner affecting the beneficial rights of the actual owners, whoever they be, either as heirs or legatees. The language of the Act does not permit one to say that the Act confers on the dependant nominee anything more than the right to possession and dominion, such as an executor has, in whom the property of a deceased testator vests. Of course, if the dependant nominee happens to be the only heir or legatee, and is therefore also entitled to the beneficial rights in the sum, the entire rights of ownership would vest in him. When this is the case, the dependant's rights are conferred on him, not only by the Provident Funds Act, but by the entire law applicable to the case.

[8] Mr. Raymond next argued that it was the scheme of the Act to make the sum standing to the credit of the subscriber not a part of the estate of the deceased and therefore not liable to any of the incidents attaching to property left by a deceased person. This argument was largely based on the contentions that the words "right to receive" were equivalent to "right to receive beneficially", and that the words "shall vest" were to be construed as "shall vest as the property of the dependant", and if these contentions are not accepted the argument must fail. It can never be the scheme of an Act to enact what in fact has not been enacted in some

manner. We would further point out that there is an even more fundamental fallacy involved in the argument. It is beyond question that the sum standing to the credit of the subscriber is the property of the subscriber, though it is vested in the trustees of the fund, during the subscriber's lifetime; and that the sum standing to the credit of the subscriber at his death is, therefore, *ex hypothesi* part of the estate of the deceased. It is clearly, as a matter of logic, impossible to enact anything occurring on or after the death of the deceased which could affect the answer to the question, what was the estate left by the deceased. Even an enactment by which all the property on the death of a person was to become the property of the State and vest in the state and that no part of it was to go to the creditors of the deceased or to his heirs or legatees could not affect the fact that every bit of property which the deceased died possessed of was part of the estate of the deceased. There is no magic in the words "estate of the deceased", and the answer to the question, what was the estate of the deceased, cannot be different from the answer to the question, what did the deceased die possessed of. The vesting of the property on the death of the deceased cannot have any relevance on the question. All property belonging to any individual must vest in somebody on the death of the individual. It is, therefore, in our opinion, clearly impossible to maintain that because a particular part of the property of an individual on his death vested in a particular manner, it ceased to be part of the property left by the deceased or of the estate of the deceased. What is to happen to the property left by the deceased after his death is of course an entirely different matter. The Provident Funds Act undoubtedly makes the provident fund free from liability to creditors and assignees to the extent provided in the Act, and in certain cases makes it vest in the dependant on the death of the subscriber, but it does nothing further. It may be said that in respect of the liability to satisfy creditors or the necessity of obtaining probate, letters of administration or a succession certificate the provident fund enjoys certain statutory exemptions and in that sense and in those cases is not treated as a part of the estate of the deceased, but it does not therefore cease to be part of the estate of the deceased. The provident fund passes on the death of the subscriber by a succession as the rest of the subscriber's property.

[9] We shall now refer to some of the decisions which were discussed before us.

[10] *C. D. M. Hindley v. Joynarain Marwari*, 46 Cal. 962 : (A. I. R. (7) 1920 Cal. 305), is a decision of Rankin J. under the old Provi-

dent Funds Act of 1897, in a case where the subscriber had died intestate and without making any nomination. The decision contains the following very well-known and often quoted remarks regarding the scope and purpose of Acts like the Provident Funds Act :

"These Acts make provision in the interests of certain large classes of employees for a scheme of compulsory and to a limited extent voluntary thrift. Part of the employee's wages is impounded whether he likes it or not: within narrow limits he has an option to contribute more: the employer has on his side to add a contribution: and these sums together with interest, profits or other increments make a total fund of which a defined proportion is held on the individual account of each employee. The Legislature is dealing with people who are poor, with people who are being compelled, and with such people in very large numbers. Its intention is that such people shall in case of necessity be able to afford a passage home to Europe, in case of retirement have something to live on, in case of death have something to leave. It is not ignorant that if a railway has a hundred thousand employees, the temptation to run into debt or to charge or anticipate his share will occur at some moment of his life-time to ninety thousand of them at least. Neither the Railway Company nor the Institution is to have its money wasted in large quantities upon the management expenses. There is to be no standing army of attorneys and attorneys' clerks attending to notices and orders from all the Courts in India, settling priorities among competing claims, paying the money into Court as soon as it comes in and acting towards creditors and mortgagees as a providence with costs out of the fund. By rules made for this Institution under the Act when an employee dies his share if small is to be summarily and directly distributed according to special rules which brush aside the ordinary law as to wills or intestate succession. If his share is larger it is payable to his executor or administrator and to him only on production of his grant: the burden of a due administration is thus put upon the proper shoulders. Whether the employee is in the service or out of the service, whether he be alive or dead, his share is unattachable in the hands of the institution. This is the very basis of the scheme. Section 4 (1) of the Amended Act has been judicially construed in *Veerchand v. B. B. & C. I. Rly. Co.*, 29 Bom. 259 : (6 Bom. L. R. 921) and *Seth Mannalal v. Gainsford*, 35 Cal. 641 : (12 C. W. N. 633). It means what it says and is no hardship upon anybody It (sub-s. (2) of S. 4) ensures that money payable to a widow or child as such directly shall not, even in their hands, be treated as assets of the deceased's estate. Nay more; the legislature knowing that this might be rendered ineffective by getting the widow or child to incur or to join in incurring the debt, provides (for the more complete discouragement of creditors) that such money, although in the hands of the widow or the child, shall not be made to answer for their own debts if incurred in the life-time of the deceased."

It is hardly necessary to emphasise the words: "The Act means what it says and is no hardship upon anybody" and the important words "the burden of a due administration is thus put upon the proper shoulders". It was emphasised that the trustees of the fund were not to be unduly burdened with settling priorities and having to decide questions of law, and that the

burden of deciding such questions when raised was left to other and proper shoulders, that is, the law Courts, after the payments were made.

[11] We will next deal with the decisions against the appellants with which we find ourselves in agreement.

[12] The reasoning in *Aimai Shewakshaw v. Awatai Dhanjishah and others*, 18 S. L. R. 311 : (A. I. R. (11) 1924 Sind 57), Kennedy J. C. and Raymond A. J. C.) which is directly in point here, it appears to us, has not been refuted in any of the cases in which a different view has subsequently been taken. Kennedy J. C. pointed out that there were two main objects which the Provident Funds Act had in view: first, that the administrators of the fund should be spared litigation by securing that there should always be some person who was authorised to receive the fund and give a valid quittance, and secondly, that the near relations of the subscriber should not in case of the subscriber's sudden death be compelled to take dilatory and expensive legal steps. He pointed out that the object of a nomination was to designate some person to whom the Provident Fund had to be paid and who could give a valid quittance. He emphasised that the question, what the recipient of the sum had to do after receiving the payment, was left untouched by the Act. He pointed out that the words "vest" did not connote anything more than dominion over the property, and that the vesting could not defeat the legal claims of others. With regard to the argument that a nominee received the sum as an owner, overriding the legal claims of others, entitled to the sum under the ordinary law, he said :

"I should hesitate, unless the words of the statute and of the rules framed thereunder were explicit, to suppose that the perpetration of such unnatural injustice was rendered obligatory on a subscriber to a provident fund. Nor can I conceive why the provident fund should wish to introduce so strange a law of inheritance."

With regard to the contention that the sum received by the nominee had ceased to belong to the estate of the deceased, he asked :

"Did he in any way divest himself of it during his life-time or by an instrument to come into effect after his death? and secondly, is there any provision of the law which prescribes a special method of devolution or distribution in the case of Provident Fund amounts?" and emphasised :

"It is axiomatic that no person or body can at their will introduce any peculiar rule of inheritance or distribution."

and came to the conclusion that neither the fact of nomination nor anything contained in the Act could be said to bring about such a result, and stated :

"Therefore on the whole I think that if this fund or the right to recover it was ever part of the estate of the deceased it still is."

It appears to us that in spite of the differences between the old Act of 1897 and the present Act of 1925, the reasoning in this case still remains entirely applicable.

[13] In *Hardial Deviditta v. Janki Dass*, A. I. R. (15) 1928 Lah. 773: (108 I. C. 894), a decision made after the Act of 1925, *Aimai Shewakshah v. Awabai Dhanjishah and others*, 18 S. L. R. 311: (A. I. R. (11) 1924 Sind 57), was followed.

[14] In *Hayatuddin v. Mt. Rahiman and another*, A. I. R. (22) 1935 Sind 73: (159 I. C. 427), Rupchand A. J. C. had to consider a case where the subscriber left two sons and a widow and had nominated the widow to receive the amount of the Provident Fund, and it was contended that the widow took the amount for her own benefit to the exclusion of the other heirs. The learned Judge stated that he could not find anything in the Provident Funds Act to support the widow's contention, and said:

"It is, however, argued that although the vesting of the fund might not have conferred upon the nominee the right of appropriating the fund to himself to the exclusion of others he has acquired such right by virtue of the provisions of S. 5 (1) which are new. I am afraid I can again find nothing in that section either to support this view. All that S. 5 declares is that where the rules of a fund purport to confer upon a person the right to receive the whole or any part of the fund on the death of a subscriber or depositor, the nominee of such subscriber or depositor shall be deemed to have an absolute right to receive the money unless such nomination has been duly cancelled by the subscriber or depositor. But the clause goes no further than that. It does not purport to declare how the nominee should deal with the money after he has received it. There are no words in this section or in any other part of the Act which enable the nominee, whether he be one of the heirs of the deceased or not, to retain the money with himself as his own. A right to receive the fund absolutely does not and cannot, in my opinion, mean a right to receive it for the exclusive use of the person who receives it."

[15] In *Mt. Amna Khatoon v. Abdul Karim*, A. I. R. (24) 1937 ALL. 562: (163 I. C. 530) (Sulaiman C. J. and Bennet J.) a railway employee, who left a widow, a mother, a brother and several children, had nominated the mother. In the course of the judgment, Sulaiman C. J. stated:

"It accordingly follows that S. 5 refers merely to the persons who are nominated to receive the provident fund from the authority in question and the right to receive such fund on the death of the subscriber is absolute and cannot be questioned by such authority. But this nomination is itself subject to any disposition, testamentary or otherwise, which might have been made by the subscriber. It follows accordingly that the mere fact that a certain person has been declared to be the nominee under S. 5 for the purpose of receiving the provident fund is not necessarily the sole person entitled to appropriate the amount as the owner, legatee or heir. The question of the distribution of the amount after it has been drawn by the nominee as among those who may be entitled to it either under the personal law or

by testamentary disposition is not covered by this section."

He also stated:

"The mother was, therefore, a person who was authorised under the rules to receive payment, being a dependant of the deceased. It follows that under S. 3 (2) the amount vested in her absolutely free from any debt or other liability incurred by the deceased or incurred by the dependant before the death of the subscriber or depositor, because the sum was payable under the rules of the fund to this dependant of the depositor."

[16] We will now turn to the cases in which a contrary view has been expressed. In *Mt. Hurmat Bibi and anr. v. Mt. Kaz Banu and ors.*, A. I. R. (19) 1932 Sind 115: (139 I. C. 775), Aston A. J. C. had to consider a case where the nominee was a widow and the deceased had left other heirs, and the question raised was whether the widow had the right to appropriate the amount to the exclusion of the other heirs. In his reasoning the learned Judge throughout speaks of the absolute right of the widow to receive the sum. There can be no question about the widow having such a right. The learned Judge, however, concluded that the absolute right to receive was a right to appropriate the amount, although there is nothing in the judgment to show how the absolute right to receive the amount became a right to keep the amount as its exclusive owner. The learned Judge sitting as a single Judge referred to the decision in *Aimai Shewakshaw v. Awabai Dhanjishah and ors.*, 18 S. L. R. 311: (A. I. R. (11) 1924 Sind 57), which was a Bench decision, and held that that decision had no application, because it had been given before 1925, under the old Act. We are unable to find any reason in this decision for regarding Kennedy J. C.'s decision as inapplicable.

[17] In *Thaj Mahomed Saib v. Balaji Singh*, 57 Mad. 440: (A. I. R. (21) 1934 Mad. 173), (Sundaram Chetti and Walsh JJ.) the nominee was the deceased's son and the only question was whether the sum in the hands of the nominee was liable for the debts of the deceased subscriber. The learned Judges decided that the sum was not liable for the debts incurred by the deceased. Now, there can be no question whatever about the conclusion of the learned Judge being a correct one, because S. 3 (2) enacts in terms that the sum shall "be free from any debt or other liability incurred by the deceased." The learned Judges, however, did not base their decision on these very clear words in the Act relating to the very question which they had to decide. They based their conclusion on the fact that under the Act the sum vested in the nominee, and stated:

"This statute has vested that fund in the son, and consequently it has become the property of the son. This fund cannot, therefore, be deemed to have devolved

on the son by right of inheritance. That being so, how can it be regarded as the assets of the deceased depositor in the hands of his son?"

We are wholly unable to accept this reasoning. It is true that the sum vested in the nominee, but surely it was incorrect to hold that the sum, therefore, became the property of the nominee. The vesting only conferred the right of possession and dominion. We are also unable to agree that because the property vested in the son on the death of the father, it did not devolve on the son, and could not be regarded as part of the assets of the deceased. No one can question that in every case where a man dies his property and all his vested rights therein vest in the executors and/or his heirs and legatees at the moment of his death, and it is impossible to contend that because of such vesting the property was not part of the estate of the deceased. With all respect to the learned Judges the reasoning in this case appears to us to be fallacious.

[18] In *Ahmad Abdul Razzak and others v. Jamala Bint Mehdi*, 59 Bom. 475 : (A. I. R. (22) 1935 Bom. 234), a Bench of the Bombay High Court (Rangnekar and Divatia JJ.) had to consider a case in which a Muhammadan subscriber to the Provident Fund of the Aden Port Trust died leaving several heirs including a widow whom he nominated to receive the Provident Fund. The learned Judges decided that the widow was entitled to the sum to the exclusion of the other heirs. The reason of the decision is contained in the following passage :

"Section 3 says that the fund vests in the dependant and exempts it from any debt which the deceased himself may have contracted or which the dependant may have contracted before the death of the subscriber. That being so, it is clear that it does not form part of the estate of the deceased and the plaintiffs' suit was bad."

As we have stated when considering the Madras case, next before referred to, this reasoning appears to us to be a case of *non sequitur*.

[19] We next come to the decision in *Mohammad Naim and another v. Mt. Munim-un-Nissa*, 11 Luck. 611 : (A. I. R. (23) 1936 Oudh 32 F. B.). This was a case in which a Railway employee left two widows, five sons and a daughter and had nominated two of his sons to receive the amount of the Provident Fund due to him. The question was whether the two nominees took the entire amount to the exclusion of the other heirs. There was a difference of opinion between Ziaul Hasan J., who held that the nominees had only the right to receive and that the rights of the other heirs were unaffected thereby, and Srivastava J. who came to the conclusion that nomination in favour of the two sons had the effect of a valid testamentary disposition in their favour, unaffected by the Muhammadan law. Srivastava J. held that s. 5, Provident Funds Act, had the

effect of wiping out the ordinary law, and conferring on the nominee the right to receive the sum as a person beneficially entitled thereto. He stated :

"It is, however, argued that the section should be construed as referring only to a nomination for the purpose of realising the Provident Fund as distinguished from appropriating it. If such had been the intention, it would have been more appropriate for the legislature to use the word 'realise' instead of the word 'receive.' Further it seems to me that if the section was intended to refer merely to a right to realise, there was no point in prefacing it with the clause 'notwithstanding anything contained in any law for the time being in force.' I cannot think of any provision in any system of personal law or for the matter of that in any other law which might prevent a subscriber or depositor, to whatever religion or nationality he might belong, from nominating any person whom he might choose for the purpose merely of realising his deposit. In my opinion, therefore, the plain object of the clause 'notwithstanding anything contained in any law for the time being in force' is to wipe out the ordinary law and to give the subscriber or depositor unfettered discretion in the matter of nominating the person or persons who are to get the amount of the provident fund. The words 'shall be deemed to confer such rights absolutely' also appear to me to fit in better with the idea that the nominees become absolutely entitled to the sum which they are entitled to receive rather than with the idea that they have an absolute right of merely realising the money."

On this difference, the case was referred to a third Judge, King C. J., who agreed with the conclusion of Srivastava J. He stated in the course of his judgment :

"It must be conceded therefore that Exs. A-1 and A-2 would not be valid wills under the Mohammadan law. The question is whether their validity can be supported by the provisions of S. 5. In my opinion the words 'notwithstanding anything contained in any law for the time being in force' have the effect of validating the wills notwithstanding anything contained in the personal law of the depositor. The words 'any law' are very wide and certainly include the personal law of the depositor . . . The word 'absolutely' seems to mean that the recipient is to be deemed to be entitled to receive the money free from any charge or attachment or liability enforceable by other heirs or by creditors. It implies that the recipient is to take a beneficial interest in the sum which he receives. If the nominee is only entitled to realise the money on behalf of the whole body of heirs, the provision that such right shall be deemed to have been conferred upon him 'absolutely' seems meaningless."

The words "right to receive" the sum were thus construed as meaning "a right to take a beneficial interest in the sum," an entirely different right, on grounds which were mainly concerned with the supposed intentions of the legislature, a method of construction which, as we have pointed out above, is not permissible. It also appears to us, with all respect, that the reasoning of Srivastava J. and King C. J. does not show sufficient appreciation of the fact that it was necessary to make the right to receive an absolute and indefeasible right, in order to prevent persons, other than the nominee, claiming to have a better title to the sum, and therefore a superior

right to receive the sum from the trustees of the fund. It is one of the main purposes of the Act to prevent the administrators of the fund from having to face such difficulties.

[20] It is unnecessary to refer further to the decisions in *In the goods of Stanley Austin Cardigan Martin*, A. I. R. (26) 1939 Cal. 642 : (187 I. C. 886), *Keshab Lal v. Ivarani Rudra*, A. I. R. (34) 1947 Cal. 176 : (231 I. C. 270); and the Bombay decisions which have followed the decisions which have been considered above.

[21] After a most careful consideration of the reasoning in all the decisions which have been mentioned above, we are of the view that the decision in *Aimai Shewakshaw v. Awabai Dhanjishah and others*, 18 S. L. R. 311 : (A. I. R. (11) 1924 Sind 57), was correct and is still applicable. We are of the view that the Provident Funds Act confers on the nominee, even when the nominee is a dependant, nothing more than the right to receive the amount. It does not confer on the nominee the full rights of an owner, and does not touch the rights of those entitled to the sum as heirs or legatees, under the law applicable to the case.

[22] The appeal is accordingly dismissed with costs.

R.G.D.

Appeal dismissed.

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A. I. R. (36) 1949 Sind 46 [C. N. 16.]

TYABJI C. J. AND MOHOMED BACHAL J.

Ghulam Mohammad Khan — Applicant v. The Crown.

Criminal Misc. Appln. No. 17 of 1949, Decided on 22nd April 1949.

(a) N. W. F. Province Public Safety Act (1948), S. 2 (c) (i) (iv) and (vi) — Whether ultra vires the provincial legislature — Government of India Act (1935), Sch. VII, List I, item (*Quære*).

Quære — Whether sub-cl. (i), (iv) and (vi) of cl. (c) of S. 2 are ultra vires the provincial legislature, on the ground that the subject-matter falls exclusively under item 1 of List I in Sch. VII, Government of India Act. [Para 5]

(b) N. W. F. Province Public Safety Act (1948), S. 2 (c) (iii) — "Prejudicial act" — Extravagant speeches charging Government with inefficiency, corruption and personal animosity do not fall under expression "prejudicial act" — Penal Code (1860), S. 124A.

The mere making of speeches, however extravagantly worded, charging members of the Government with inefficiency, corruption and personal animosity, cannot rightly be regarded as acts intended or likely to bring into hatred or contempt, or to excite disaffection towards the Government established by law, such as to make them "prejudicial" acts within the meaning of the words in sub-cl. (iii) of cl. (c) of S. 2. [Para 8]

Annotation : ('46-Man.) Penal Code, S. 124A N. 2 and 4.

(c) N. W. F. Province Public Safety Act (1948), S. 12 — Order under S. 3 after satisfying conditions laid down in S. 3 — Court cannot go into question

whether on information before Province, it was justified from considering that the person was about to act in manner amounting to offence or which was likely to endanger public peace — Though there is contradiction between terms of S. 12 and S. 23, S. 12 is not nullified — Contradiction is due to bad drafting.

Where it is shown that the order of detention is a proper order as contemplated by S. 3 of the Act, passed after the conditions stated in the section had been duly fulfilled, the Court cannot go into the question, whether on the information before them the Province were or were not justified in considering that the person detained was about to act in a manner which amounted to an offence or was likely to endanger the public peace.

[Para 10]

Though there is contradiction in the terms of S. 12 and S. 23 of the Act, it does not necessarily follow that the provision in S. 12 of the Act, which prevents Courts from questioning an order made under S. 3, even on an application made under S. 491, Criminal P. C., is nullified by the terms of S. 23 of the Act, in which it is stated that the provisions of the Act were in addition to and not in derogation of the provisions of any other Act in force. The sections must be construed together remembering that the legislature enacted both these sections, which must, therefore, be so construed as to give the enacted words the meaning which they were clearly intended to have. The contradiction is the result of only bad drafting and the inconsistency disappears if the words "shall be in addition to and not in derogation of the provisions of any other Act" in S. 23 are read as subject to the exceptions which were necessarily created where the terms of the Act had expressly enacted provisions which were in derogation of provisions in other Acts. [Para 11]

(d) N. W. F. Province Public Safety Act (1948), S. 3 — Government must show that it had given the matter kind of care and attention that the law requires should be given to matter when liberty of individual is concerned — Held on facts that the Government did not give such care and attention and the order was therefore bad — Affidavit by Advocate-General long after order held could not take place of order.

The terms of S. 3 make it quite clear that the Provincial Government is only empowered to pass an order under that section "on being satisfied" that it was necessary to arrest a person who had committed a prejudicial act or in order to prevent a person from committing a prejudicial act. It is obvious, that it is necessary for the Provincial Government to show that they had given the matter the kind of care and attention that the law requires should be given to the matter when the liberty of an individual is concerned, that it had carefully considered the facts and the law applicable to the matter, and that as a result of such careful consideration, it was satisfied that the action proposed was necessary and was justified. [Para 12]

Government are bound to take into consideration the fact that a person could not be locked up merely for making speeches against a Minister in power, and attempting to get rid of him. In such case there is need for a very careful consideration of the question whether the applicant was in fact concerned in assisting the movement which had been declared to be illegal, when he had been professing the contrary. Where under the circumstances there is no indication in the order signed by the Chief Secretary of any such care and attention having been bestowed on the matter by any particular responsible member of the Provincial Government who was prepared to shoulder the responsibility and state that he had after a careful considera-

tion of the matter, satisfied himself on the matter, the order cannot be regarded as an order passed under S. 3. [Para 12]

Statement by the Advocate-General in an affidavit, to the best of his knowledge and belief, made long after the order was passed, that the Government "was satisfied on the matter and had carefully considered all the materials placed before it" cannot take the place of an order, or a statement on the record from a responsible Minister or Officer entitled to represent the Provincial Government showing that he had given the matter his personal attention, and had in fact satisfied himself after a proper consideration of all aspects of the matter, that the order contemplated was justified and necessary. It would obviously be most dangerous to assume that such a thing was done when there was no proper document subscribed to by person who had satisfied himself on the record made at the time when or before the order was passed. The emphasis is not so much on the formal defect of the order; the emphasis is on the state of the mind of the detaining authority. If the state of the mind of the detaining authority discloses that the authority had been casual in its approach to the matter and had not shown that diligence and care which the law insists upon in such cases, the order must be regarded as not one made under the provisions of the Act: A. I. R. (36) 1949 Bom. 75, *Rel. on.* [Para 12]

H. S. Suhrawardy, Ziauddin, Toric Ahsanulla and M. Ahsanulla — for Applicant.

Mohammed Shafi Advocate-General of N. W. F. P. and Fatechand Assudomul, Advocate-General of Sind — for the Crown.

Tyabji C. J. — This is an application under S. 491, Criminal P. C., made by Ghulam Mohammad Khan s/o Khadi Khan of Lund Khwar, Tehsil and District Mardan, which has been transferred to this Court by the N. W. F. Province.

[2] The material facts in this case are these: The applicant was arrested on 29th July 1948 under an order made under the North West Frontier Province Public Safety Ordinance. This Ordinance ceased to be in operation after 25th November 1948. The applicant, however, continued to be detained as he contended, illegally, and as the N. W. F. Province contended, by virtue of S. 29 (2), North West Frontier Province Public Safety Act, 1948, which came into operation on 13th December 1948. On an application made under S. 491, Criminal P. C., the Court of the Judicial Commissioner, N. W. F. Province, Peshawar, held that the detention of the applicant was illegal and ordered his release, on 10th January 1949. On the same date, another order was passed against the applicant who was again arrested. With regard to this order, there is before us a document signed by Mr. P. C. Hailey, the Chief Secretary to Government, North-West Frontier Province, in which it is stated:

"The Governor, North West Frontier Province, with a view to prevent Ghulam Mohammad Khan of Lund Khwar from committing any prejudicial act as defined in cl. 2 of N. W. F. Province Public Safety Act, 1948, Act XXI [21] of 1948, in exercise of the powers con-

ferred upon him under cl. 3 of the said Act, is pleased to order the arrest without warrant of the said Ghulam Mohammad Khan. The said Ghulam Mohammad shall be committed in custody to Central Jail, Peshawar, for a period of one year. The Governor is further pleased to order that during the time of his detention the conditions as to maintenance, discipline, punishment of offences and breaches of discipline shall be those as laid down in the N. W. F. P. Security Prisoners Rules, 1944."

[3] The applicant contends before us that this detention was illegal. In his extremely lengthy petition he has challenged the bona fides of the Prime Minister of his Province, and the main burden of his complaint is that it was due to the malice of the Prime Minister that this order had been passed against the applicant, in fraudulent exercise of the powers conferred under the N. W. F. Province Public Safety Act. It is also argued that the enactment under which the order purported to be made was *ultra vires*. The applicant stated that, if given an opportunity, he was prepared to prove by leading evidence that the intention behind the order passed against him was to compel the applicant to withdraw his opposition to the Prime Minister.

[4] We have heard Mr. H. S. Suhrawardy and Mian Ziauddin at great length on this application, and we have also heard Sheikh Muhammad Shafi, the Advocate-General of the North-West Frontier Province on behalf of that Province.

[5] It is unnecessary, it appears to us, to give any decision on the assertion made on behalf of the applicant that the N. W. F. Province Public Safety Act of 1948 was *ultra vires*. It does appear to us, however, that it is very arguable that certain portions of the Act were *ultra vires*. Preventive detention for reasons connected with the maintenance of the public order is a subject covered by item 1 of List 2 in Sch. 7, Government of India Act, 1935, and legislation on this subject is within the competence only of the Provincial Legislature. On the other hand, preventive detention within Pakistan for reasons of State connected with external affairs is clearly a subject which is exclusively within the province of the Central Legislature as it is covered by item 1 in List I. It is argued that the definition of a "prejudicial act" in S. 2 of the Act impugned would, if the Act be regarded as entirely valid, empower the N. W. F. Province to detain an individual, even when it was admitted that the individual had not done, and was not likely to do, anything which was at all likely to endanger the public safety within the Province or which amounted to a contravention of the law within the Province. A person could, if the Act be regarded as entirely valid, be detained on the ground that, although he was doing none of these things, his presence within the Province was

likely to prejudice the relations of Pakistan with some area outside the Province and even outside Pakistan. Provisions authorising such detention would clearly not only transgress upon the field exclusively reserved to the Central Legislature but also be wholly outside the scope of the legislation covered by item 1 in List 2, and in an Act passed by a Provincial Legislature would be *ultra vires*. The entire sub-cl. (i) in cl. (c) of S. 2 of the Act, it is argued, is *ultra vires* on this ground. Similarly, it is argued that the words in sub-cl. (iv) : "or any State or Tribal Area", and the entire sub-cl. (vi) were open to a similar objection. It was argued before us that this invalidated the entire Act. It appears to us that the objected portions could very easily be severed from the remainder of the Act, and in his arguments before us the learned Advocate-General of the N. W. F. Province has not relied on any portion of the Act which has been objected to on this ground. We consider it quite unnecessary to say anything further on this matter.

[6] With regard to the actual grounds on which, it is alleged, action was taken against the applicant in this case, besides the order passed over the signature of the Chief Secretary, which has been set out above, there are certain affidavits filed by Sher Afzal Khan, the Deputy Commissioner of Mardan, and Pir Sarwar Shah, the Superintendent of Police of Mardan, and a statement and an affidavit filed by the Advocate-General of the N. W. F. Province.

[7] In his evidence, given before us, Mr. Sher Afzal Khan stated as follows :

"The applicant was arrested on 29th July 1948 under the orders of the Provincial Government at my instance. I reported that the applicant who was then residing in my district was making anti-Government speeches. What I had found was that the applicant was making speeches criticising the Government. What I considered objectionable in his speeches was that he was charging members of the Government with inefficiency, corruption, and personal enmity. He alleged that the Government had been charging him with an offence under S. 409, Penal Code, on personal grounds. I cannot say that I found anything else which was objectionable in his speeches.

I also found that the applicant used to go to the police stations and the District Supply Office. It was reported to me that in 2 or 3 police cases he had gone to the police station and attempted to intimidate police officers and so influence them. It was reported to me that he once assaulted the District Supply Inspector, though he did not cause any actual hurt, or beat anybody. He was not reported to have been accompanied by anybody else at the time. I also found that he was associating with Abdul Ghani, a son of Abdul Ghaffar Khan who was found in the car with the applicant, and stayed a night with the applicant.

This is the main allegation against the appellant. There may be other minor matters which I cannot think of.

The prejudicial acts which in my opinion were being committed by the applicant or were likely to be committed consisted in defamation of Government servants,

and bringing the Provincial Government into contempt.

It is true that I am the principal officer on whose instigation the Provincial Government acted and arrested the applicant. I wish to add that the applicant used to maintain that the Government of Pakistan and the Provincial Government of Peshawar was run by refugees from India and Kashmir, and not by true Pakistanis. He meant that Pathans belonging to the N. W. F. Province itself should govern the Province and not outsiders. It was our contention that what I have stated above was a sufficient reason for the arrest of the applicant under the Ordinance."

[8] This evidence was relied upon before us as showing the grounds necessitating the arrest of the applicant. It was urged with considerable force on behalf of the applicant, and is indeed obvious that the mere making of speeches however extravagantly worded, charging members of the Government with inefficiency, corruption and personal animosity, could not rightly be regarded as acts intended or likely to bring into hatred or contempt, or to excite disaffection towards, the Government established by law, such as to make them "prejudicial" acts within the meaning of the words in sub-cl. (iii) of cl. (c) of S. 2. We were referred to certain decisions in which it was pointed out that words such as those used in this sub-clause, when used in an enactment dealing with measures for the maintenance of public order and to prevent danger to the public safety, had to be construed as being restricted to such acts as were likely to overthrow the system of the Government established by law, and not merely to overthrow any particular ministry or any particular Minister.

[9] The learned Advocate-General of the N. W. F. Province, however, made no attempt to justify the order on the ground relating to the speeches and principally relied on the allegation that the applicant was associating with one Abdul Ghani, a son of Abdul Ghaffar Khan, who, it was alleged, was a principal participant in a movement which had been declared illegal by the N. W. F. Province. The learned Advocate-General argued that the associating was for the purpose of assisting the movement, which was illegal and was intended to be subversive of the Government established by law. It was argued on behalf of the applicant that the evidence with regard to the association of the applicant with Abdul Ghani, and of the applicant's assistance in the illegal movement, was of the flimsiest character, such that no reasonable person could act upon it; and it was alleged that, as a matter of fact, it was well known that the applicant had throughout been a staunch opponent of the illegal movement, for the creation of Pathanistan, and a staunch supporter of Pakistan and of the present system of Government as established by law in the North-West Frontier Province.

[10] If the order made in this case had been shown to be a proper order as contemplated by S. 3 of the Act, passed after the conditions stated in the section had been duly fulfilled, we do not think we could have gone into this question, whether on the information before them the N. W. F. Province were or were not justified in considering that the applicant was about to act in a manner which amounted to an offence or was likely to endanger the public peace.

[11] It was argued before us that the provision in S. 12 of the Act, which prevents Courts from questioning an order made under S. 3, even on an application made under S. 491, Criminal P. C. was nullified by the terms of S. 23 of the Act, in which it was stated that the provisions of the Act were in addition to and not in derogation of the provisions of any other Act in force. The contradiction in the terms of S. 12 and of S. 23 is obvious. It does not, however, necessarily follow that S. 12 had been nullified. We have to construe the two sections together remembering that the legislature enacted both these sections, which must, therefore, be so construed as to give the enacted words the meaning which they were clearly intended to have. There is no difficulty in doing so here. It is clear that the contradiction is only the result of bad drafting, and that the inconsistency disappears if the words "shall be in addition to and not in derogation of the provisions of any other Act" are read as subject to the exceptions which were necessarily created where the terms of the Act had expressly enacted provisions which were in derogation of provisions in other acts. This matter we think is of very little consequence in the particular case before us.

[12] The most considerable point urged before us relates to the question whether we at all have before us an order passed under S. 3 of the Act. The terms of S. 3 make it quite clear that the Provincial Government is only empowered to pass an order under that section "on being satisfied" that it was necessary to arrest a person who had committed a prejudicial act or in order to prevent a person from committing a prejudicial act. It is obvious, on general considerations which apply to the construction of all provisions of this nature, that it is necessary for the Provincial Government to show that they had given the matter the kind of care and attention that the law requires should be given to the matter when the liberty of an individual is concerned, that it had carefully considered the facts and the law applicable to the matter, and that as a result of such careful consideration, it had been satisfied that the action proposed was necessary and was

justified. In our view it is quite clear that in this case we would not be justified in holding that this essential condition, which must be shown to have existed before the order can be regarded as a legal one, had been fulfilled. The material facts are that the Deputy Commissioner of Mardan asked the Provincial Government to take action. The evidence of the Deputy Commissioner, which has been set out above, hardly makes out a case in which action under the Act could be justified, and makes it abundantly clear that there was need for a very careful consideration of the facts of the case, that far more information than is mentioned in the evidence given by the witness would be necessary before it could reasonably be urged that an order under S. 3 was called for. Government were bound to take into consideration the fact that a person could not be locked up merely for making speeches against a Minister in power, and attempting to get rid of him. There was need for a very careful consideration of the question whether the applicant was in fact concerned in assisting the movement which had been declared to be illegal, when he had been professing the contrary. It is remarkable, and under the circumstances most important, that there is no indication in the order signed by the Chief Secretary of any such care and attention having been bestowed on the matter by any particular responsible member of the Provincial Government who was prepared to shoulder the responsibility and state that he had after a careful consideration of the matter, satisfied himself on the matter. This is far from being merely a formal criticism of the terms in which the order was passed, and is something which is vital and of the greatest importance with regard to the question, whether we had before us an order which could be regarded as an order passed under S. 3. We have an affidavit before us filed by the Advocate-General of the Province in which it is stated, "that the North-West Frontier Province Government was satisfied on the matter and had carefully considered all the materials placed before it." We have not the slightest doubt that this is a statement made to the best of his knowledge and belief by the learned Advocate-General, but we do not think that such a statement, made long after the order was passed, can take the place of an order, or a statement on the record from a responsible Minister or officer entitled to represent the Provincial Government showing that he had given the matter his personal attention, and had in fact satisfied himself after a proper consideration of all aspects of the matter, that the order contemplated was justified and necessary. It would obviously be most dangerous to assume that such a thing was done when there was no pro-

per document subscribed to by the person who had satisfied himself on the record made at the time when or before the order was passed. In considering the absence of a categorical, accurate and sufficient statement on the point, in the order itself or in some other document made prior to the order, the emphasis, as was pointed out by the learned Chief Justice of Bombay in *re Shoilen Dey*, A. I. R. (36) 1949 Bom. 75 : (50 Cr. L. J. 173), is not so much on the formal defect of the order; the emphasis is on the state of the mind of the detaining authority. If the state of the mind of the detaining authority discloses that the authority had been casual in its approach to the matter and had not shown that diligence and care which the law insists upon in such cases, the order must be regarded as not one made under the provisions of the Act. We are not at all concerned with the question whether if proper consideration had been given, such an order might or might not have been properly and validly made.

[13] We are, therefore, of the view that the applicant's detention has not been shown to have been legal and proper. We accordingly order that he should be released.

[14] As in this matter a substantial question of law was raised, as to whether the Act, under which the order against the applicant purports to have been made, was valid, and regarding the validity of Ss. 12 and 23 of the Act, a certificate will issue under S. 205, Constitution Act.

[15] The applicant prays for his costs. There is nothing in the rules of this Court entitling him to costs. We are informed that in the N.-W. F. Province the applicant could claim his costs on succeeding on an application under S. 491, Criminal P. C. Although we cannot grant the applicant his costs, we give him the liberty to apply, if he so chooses, to the Court of the Judicial Commissioner, N.-W. F. P., for his costs.

R.G.D.

Application allowed.

A. I. R. (36) 1949 Sind 50 [C. N. 17.]

TYABJI C. J. AND O'SULLIVAN J.

Pestonji Bhicaji, a Firm, Karachi — Appellant v. Asibai and another — Respondents.

Misc. Appeal No. 11 of 1947, Decided on 22nd May 1948.

Workmen's Compensation Act (1923), S. 5 (a) (b) and (c)—Workman, such as a tindal, employed for a few days with one employer and after completion of the piece of work engaged by another employer—Retainer given by employer and workman periodically employed by him over whole period of preceding year—S. 5 (a) and (c) not applicable but S. 5 (b) would apply—Method of calculation would be second method provided under S. 5 (b).

Section 5 (a) only covers a case where there has been continuous employment under the same master during the period of 12 months preceding the accident. Where the workman, such as a tindal, was employed for a few days with one employer and when after the particular piece of work on which he was engaged was completed, he was engaged by another employer, his service would be of a casual nature not covered by S. 5 (a) although the workman might have been in receipt of a retainer by a particular set of employers and have been periodically employed by them over the whole of the preceding year. Section 5 (c) also requires continuous employment under the same master and would not apply to such a case. Section 5 (b) covers cases where the workman was continuously employed under one master but whose service with that master was less than one month and also cases of casual employees who were liable to be employed from day to day by different employers and would apply to the above case. The method of calculation provided in the first part of S. 5 (b) would not apply because the workman upon whose wages the computation is to be based under it is a regular employee and a tindal would not come under the category of a regular employee. The second method would apply for the language used would include wages from any source and by any employer. *Case law referred.*

[Paras 15, 16, 20, 22, 24, 25]

Annotation : ('46-Man.) Workmen's Compensation Act, S. 5 N. 1.

Choithram D. Motwani — for Appellant.

L. S. Lulla—for Respondents.

O'Sullivan J.—This is an appeal under S. 30, Workmen's Compensation Act, against an order of Commissioner under the Workmen's Compensation Act, Karachi, awarding a sum of Rs. 3000 as compensation to the mother and daughter of a deceased workman Jumo son of Ambo.

[2] The appellants are a firm of Stevedores carrying on business at Karachi and Jumo was in their employment as a tindal, when on 12th February, 1945, he was injured while engaged in loading a ship. He was removed to the Civil Hospital and under X-Ray examination was found to have sustained, among other injuries, a fracture of the spinal column. He was paralysed and had he survived, would in the opinion of the Medical Officer, Dr. Sobhraj, have been a cripple for life. He voluntarily left the hospital on 20th February 1945, and he died in his own home on 4th March 1945.

[3] Asibai, the mother of Jumo, and Fatma, his daughter made an application under the Act

claiming Rs. 3500 as compensation. This was contested by the appellants on the ground that Jumo's death was not caused by the accident, but was mainly attributable to his having left the hospital unauthorisedly and having failed to take proper medical treatment. The amount claimed was disputed.

[4] The Commissioner found that the death of Jumo was the direct result of the injury sustained by him while working for the appellants on 12th February 1945, and that the monthly wages of the deceased were Rs. 95/5. On this basis, he awarded Rs. 3000/- as compensation.

[5] The only point raised in this appeal is as to whether the monthly wages of Jumo have been correctly computed.

[6] The Commissioner found that Jumo's monthly wages fell to be computed under cl. (b) of S. 5 of the Act, since his service was of a casual nature.

[7] The evidence established that although Jumo was a tindal in receipt of a monthly retainer of Rs. 8 and an allowance of Rs. 7/8 from the appellants, he was only employed by them as such for an average of eight days each month, his wages being that of a day labourer to wit, Rs. 2/3 per day with an additional rupee as tindal's fee. It was found by the Commissioner that tindals such as Jumo were permitted to work for other stevedores when their services were not required by their regular employers. Referring to certain of the evidence in this connection, the Commissioner said:

The original stand of the learned advocate of the opponent was that tindal is paid servant of the Dubashes and he cannot work as labourer with the same Dubashes or the other Dubashes as an ordinary labourer. The stand taken by the learned advocate is falsified by the supervisor of the opponents, Mr. Jamshed who has been in charge of the case and has been attending Court. He says that tindals work with the labourers and do the same kind of work. They are not concerned what they do, when they do not employ them. He also admits that they can work as ordinary labourer with other Dubashes or even under the same Dubashes under other tindals. He has even given instances when the deceased though a tindal has worked as ordinary labourer under Habibullah and Ponjaji, the two tindals of the opponent who have been examined in this matter and have denied the fact. Mr. Jamshed, a Dubash, is supported in this by the Registrar and by the evidence of Karo Makaji, a tindal, of the opponent since 25 years. He also says that Tindals can work under the same Dubashes or different Dubashes, wherever there is work available.

No doubt Tindals do get retainers, but that does not prevent them from seeking employment elsewhere, and the only penalty for their absence is that they lose their turn. This retainer is paid to have their good will to secure labour.

Thus it is clear that the deceased Jumo used to work as ordinary labourer as well and was a casual labourer."

[8] There was some attempt by Mr. Choithram to question these findings of fact, but we are not prepared to take a different view of the evidence from that arrived at by the Commissioner.

[9] With regard to the number of working days upon which these dock labourers are on an average employed in a month, the Commissioner came to the conclusion that the evidence adduced on behalf of the respondents that it was 27 to 28 days was probably correct, but he decided that he should adhere to settled practice and fix the number of days as 23. He said:

"I would like to adopt a more modest course and depend upon the practice of this Court. In such cases, the average of 23 days has been allowed with full over time. In that case the average ordinary wages would be Rs. 61/13. With the tindalage, the retainer and allowance, the wages would be Rs. 95-5, and the compensation would be Rs. 3000.

[10] Mr. Choithram concedes that cl. (b) of S. 5 applies, but contends that the terms of cl. (b) do not permit of the wages of a workman being taken into consideration from a source other than from the employer in whose service he was at the time of the accident. And, therefore, according to Mr. Choithram, the wages of Jumo are to be computed on the basis of his eight day's employment per mensem as a tindal with the appellants.

[11] Jumo had admittedly been in the service of the appellants as a tindal for nine months prior to the accident, and it was Mr. Choithram's contention that had he been in such employ for 12 months, he would have come within cl. (a) of S. 5. Developing his argument, Mr. Choithram pointed out that there were certain tindals who had been in appellants' employ for over twelve months, and he said that the average monthly wages these tindals received from the appellants during the months preceding the accident based on eight days work during the month was to be taken as the basis for the computation of Jumo's monthly wages. He further said that assuming there had been no such tindals employed by the appellants during the relevant twelve months, the wages of Jumo would have to be assessed under the second part of cl. (b), on what was earned "by a workman employed on similar work in the same locality," and these words according to Mr. Choithram, carry the implication that the employment envisaged is under one employer.

[12] Mr. Choithram relied on *Cue v. Port of London Authority*, (1914) 83 L. J. K. B. 1445 :

(1914-3 K, B. 892), as explaining certain similar provisions in Sch. 1, cl. 2 (a) Workmen's Compensation Act, 1906.

[13] Before referring to the English decisions cited from the Bar, it is necessary to scrutinise the Indian enactment with which we are here concerned, the Workmen's compensation Act of 1923.

[14] It is the scheme of the Act, vide S. 4 and Sch. IV, that the amount of compensation is to be based in the case of an adult, upon his monthly wages, and S. 5 provides for the method of calculating such monthly wages.

[15] Clause (a) of S. 5 obviously only covers a case where there has been continuous employment under the *same master* during the period of twelve months preceding the accident. That is to say, there must have been a continuous employment during which the relation of master and servant substantially existed between the employer and the servant. Schedule 1 cl. 1 (a) (i), English Act contains the words "in the employment of the same employer during the three years next preceding the injury" the word "continuously" being omitted. Nevertheless such employment in the English Act has been interpreted in numerous English decisions as meaning *continuous Actual employment under the same employer*. We refer in this connection to *Gill v. Fortescue & Sons Ltd.*, (1913) 6 B. W. C. C. 577 and *Tindal v. London and North Eastern Railway Co.*, 18 B. W. C. C. 48.

[16] Whereas in this case the workman was employed for a few days with one employer and when the particular piece of work on which he was engaged—the loading of a ship—was completed, he was engaged by another employer, his service would be of a casual nature not covered by cl. (a) of S. 5, although he might have been in receipt of a retainer by a particular set of employers and have been periodically employed by them over the whole of the preceding year.

[17] Mr. Choithram laid stress on the explanation to the section which reads:

"A period of service shall, for the purposes of this section be deemed to be continuous which has not been interrupted by a period of absence from work exceeding fourteen days."

[18] This does not and cannot operate to convert what is in its nature casual service into continuous employment under the same master. It operates merely to bring within a period of continuous service with the same employer any absence from work not exceeding fourteen days,

and does not lay down as 'continuous' a service in which the workman has worked during intervals under another employer. We refer in this connection to *Bengal Burma Steam Navigation Co. v. Ramanna*, A. I. R. (19) 1932 Rang. 141 : (140 I. C. 46).

[19] We are unable to accept Mr. Ohoithram's contention, therefore, that had Jumo been in the employment of the appellants as a tindal for twelve months and not nine as in the case, his wages would have had to be computed under cl. (a). Incidentally Mr. Ohoithram was at a loss to explain why, if his contention in this respect were correct, Jumo's case should not come under cl. (c) rather than cl. (b). If his nine months period of service were to be regarded as continuous in the sense set out above, he would clearly fall under cl. (c) as being a workman whose continuous service under this same employer exceeded one month.

[20] Turning now to cl. (c), it seems clear that the words "last continuous period of service immediately preceding the accident" also mean continuous act of employment under the same master.

[21] It is to be emphasised that computation of monthly wages under cl. (c) is on the basis of thirty times the total wages earned during the last continuous period of service divided by the number of days comprising such period.

[22] Clause (b) requires to be read in the light of what has been said above regarding cls. (a) and (c). It covers cases

"where the whole of the continuous period of service immediately preceding the accident during which the workman was in the service of the employer who is liable to pay compensation was less than one month". These words obviously cover cases where the workman was continuously employed under one master, but whose service with that master was less than one month, and also cases of casual employees men who were liable to be employed from day to day by different employers.

[23] In order, however, to arrive at a proper, fair and consistent computation of monthly wages alternative methods of computation are provided for in cl. (b). The first is covered by the words :

"The monthly wages of the workman shall be deemed to be the average monthly amount which during the twelve months immediately preceding the accident was being earned by a workman employed on the same work by the same employer."

[24] These words are not as explicit as they might be. The words "continuous" and "service

which find place in cls. (a) and (c) have both been omitted but nevertheless it appears to us that the workman upon whose wages the computation is to be based as contemplated by the first part of cl. (b) is not a casual labourer but one between whom and his employer there existed for a continuous period of twelve months the relationship of master and servant; one who might for the purpose of brevity be referred to as a *regular* employee; one who worked under the same master and whose own monthly wages would be computable under cl. (a). Since the tindals and/or workmen in the appellants employment would not, for the reasons already given, come under the category of such *regular* employees, this first method of computation would not apply, and we must, therefore, in computing Jumo's monthly wages, pass on by virtue of the words "or if there is no such workman so employed" to the second method provided in cl. (b) which with the context will read :

"The monthly wages of the workman shall be deemed to be the average monthly amount which during the twelve months immediately preceding the accident was being earned by a workman employed on similar work in the same locality."

[25] These words manifestly include wages from any source and any employer. If it were not so, the greatest absurdity and unfairness might result in the case of a casual labourer who for instance might have worked for twenty-two days with one employer and then been killed on the twenty-third day in the service of another employer. If his average monthly wages were to be taken as only what he earned from the employer in whose service he was at the time of the accident, his average monthly wages would be the one day's wages, although he was employed for twenty-three days in a month.

[26] Read in the manner set out above, however, the several clauses of S. 5 assume reasonable and consistent aspect, and permit of a workman being remunerated on the basis of what he was on an average able to earn irrespective of whether he was employed on a casual or regular basis.

[27] The only Indian decision which appears to have any bearing on the present case is *Alimohamed v. Shankar*, A.I.R. (33) 1946 Bom. 169 : (224 I. C. 294) and it affords some support to the view we take of S. 5.

[28] The English cases cited from the Bar relate to cls. 1 and 2 of Sch. 1, Workmen's Compensation Act of 1906, between which and the Indian Enactment there are material differences.

[29] In *Perry v. Wright*, (1908) 1 K. B. 441 : (77 L. J. K. B. 236) Cozens-Hardy, M. R., referring to the general scheme of the English Act, described cls. 1 and 2 of Sch. 1 as "two very difficult and obscure sections." He pointed out that the language of cls. 1 (a) and (b) was a repetition of S. 1 of Sch. 1 to the earlier Act of 1897 under which the amount of compensation was described in language the effect of which was in many cases to make the workmen's compensation *almost illusory*. Clause 2 was, therefore, introduced to remedy this state of affairs, and it "purports to lay down certain rules for the guidance of those whose duty it is to assess compensation." But though the legislature obviously intended to correct hardship "the manner in which the result has been received is somewhat strange." The learned Master of the Rolls then went on to say :

"Now it is obvious that S. 1, construed by itself, deals with the ordinary case of a workman employed by only one employer, and for a sufficient period to enable his 'earnings' or his 'average earnings' to be computed with mathematical accuracy. It does not contemplate concurrent contracts of service, or *employment which in its nature is casual*. For some reason, which is not obvious, three years is the standard period in case of death, whereas twelve months is the standard period in case of partial incapacity, but in either case precision is made for taking an average for any less period. The actual history of the workman furnishes adequate material in ordinary circumstances. Section 2 contemplates circumstances which, though not uncommon, may be deemed out of the ordinary course. It lays down certain rules which must be observed wherever 'earnings' or 'average weekly earnings' occur in the schedule. The dominant principle is to be found in the first sentence of cl. (a), 'average weekly earnings' shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated. "This can scarcely be confined to one date, namely, the date of the accident; for, under S. 1 (a) and (b), it is clear that other dates cannot be disregarded. Then follows a proviso which contemplates that there may be cases in which computation is impracticable. No mandatory words are there used; the phrase is simply 'regard may be had.' The sentence is not grammatical, but I think the meaning is this : *Where you cannot compute you must estimate as best as you can, the rate per week at which the workman was being remunerated, and to assist you in making an estimate you may have regard to analogous cases.*"

[30] The words last set out above in regard to making an estimate based on *analogous* cases are emphasised. It has already been pointed out that the cases of casual and regular employees are not analogous.

[31] In *Cue v. Port of London Authority*, (1914-3 K. B. 892 : 83 L. J. K. B. 1445) it had been contended in the Court of Appeal that on the language of cl. 2 (a), it is the actual average earnings of the workman, no matter under how many different employers, that have to be

ascertained, and that it is possible to do that without reference to the proviso to the clause. This argument was not accepted by any of the three learned Judges who heard the appeal. For instance, Pickford, L. J. said :

"But the respondent seeks to uphold the amount of the award of compensation on another ground, namely, this, that the man being employed casually, and it being possible to ascertain for the twelve months preceding the accident what his actual average weekly earnings were, that amount is to be taken as the amount of his average weekly earnings, that is to say that inasmuch as taking the whole time that he has worked during the previous twelve months he has averaged something like 45s. a week, that and that alone is the thing which is to be looked at in arriving at his average weekly earnings. That seems to me to proceed upon an erroneous construction of the opening words of Sch. 1 cl. 2 (a). It proceeds upon the construction that in the case of casual employment, the average amount which the man has earned under any number of employers is to be regarded as his average weekly earnings for the purpose of that clause. I think that is an erroneous construction. I think 'average weekly earnings' in cl. 2 of the Schedule must be read as having the same meaning as 'average weekly earnings' in cl. 1 of the schedule, and that it means average weekly earnings under the same employer. It was conceded by counsel for the respondent that, apart from authority, any body who had regard to grammar and common sense would read it in that way; but he said there were authorities which obliged us to read it in a different way."

[32] There is no doubt that in a general way the decision in *Cue's case* : (1914-3 K. B. 892 : 83 L. J. K. B. 1445) lends some support to Mr. Choithram's argument, but as has been stated above, the decision turned to a considerable extent on the interpretation of the opening words of Sch. 1 cl. 2 (a), English Act, which are by no means identical with anything to be found in S. 5 of the Indian Act. Moreover, in *Cue's case*, (1914-3 K. B. 892 : 83 L. J. K. B. 1445), the first part of the proviso—that referring to the earnings of a person employed "in the same grade, at the same work, by the same employer"—was under consideration. There is nothing in *Cue's case*, (1914-3 K. B. 892 : 83 L. J. K. B. 1445) to suggest that the second part of the proviso that relating to a person employed in the same class of employment in the same district—must be read as referring to employment under one employer.

[33] It is, in any event, difficult to reconcile some of the observations in *Cue's case*, (1914-3 K. B. 892 : 83 L. J. K. B. 1445) with a reasonable interpretation of Sch. 1, English Act, or with the views expressed in other cases.

[34] In *Twidale v. London and North Eastern Railway Co.*, 18 B. W. C. C. 218, cited above, *Cue's case*, (1914-3 K. B. 892 : 83 L. J. K. B. 1445) was considered by the Court of Appeal and

doubted. I would refer to the following observation of Atkin L. J. :

"I agree. The matter has arisen upon the paragraphs of Sch. 1 to the Act of 1906, that have given difficulty before, and I have no doubt will cause difficulty again as to the computation of weekly earnings, and this particular difficulty arises in the case of a man who is employed by the London and North Eastern Railway Co. as the dock authority. He was in fact, a casual dock labourer, he sometimes worked for the respondents, and he sometimes worked for two or three other persons or firms who had business to give to men who worked in the capacity of the applicant. He had also been from time to time employed by the respondents over the whole of the preceding year. He had not worked every week for them, but in most of the weeks he had on one day or another, sometimes one, sometimes two, sometimes three, sometimes four or five or sometimes apparently six days of the week worked for them, but on each occasion the work was the ordinary employment of a casual labourer, that is to say, it was apparently a daily job, and the only employment was for that particular job. There was to my mind no continuous employment of the man at all, and he did not work under any contract of service other than a contract of service to perform the particular work for the particular day for which he was engaged. He is injured and then the question arises as to how his average weekly earnings are to be calculated and upon that we were told that there was the decision of *Cue v. Port of London Authority*, (1914) 3 K. B. 892 : (83 L. J. K. B. 1445) ; 7 B. W. C. C. 447, which prevented the learned County Court Judge from taking into account any other earnings at all other than the earnings which in fact he had earned from the particular employer who was the respondent to the application. I agree that there are statements in that case by some of the Judges which seem to point in that direction. On the other hand, there are a series of cases which appear to me to be quite inconsistent with that view."

[35] For reasons already sufficiently stated, there is nothing in *Cue's case*, (1914-3 K. B. 892 : 83 L. J. K. B. 1445) which leads us to a different view of S. 5, Indian Workmen's Compensation Act of 1923 from that indicated above. We consider that the Commissioner was correct in his findings of fact, and that he has correctly applied the law to those findings. The appeal is dismissed with costs.

[36] Tyabji C. J.—I agree. The only question before us is whether the method adopted by the Commissioner in calculating the monthly wages of the workman, Jumo, was in accordance with S. 5, Workmen's Compensation Act, VIII [8] of 1923. When Jumo met with the accident, as a result of which he died, he was actually working as a tindal employed by the appellants. He had been the appellants' tindal for nine months before the accident. This, as the evidence shews, only meant that during that period he was bound to serve the appellants as a tindal, i.e., a supplier of labour, whenever called upon to do so, and not that he was continuously employed

by the appellants during that period. He had in fact been required by the appellants to work as a tindal, on the average, for about eight days in every month. The appellants had to pay Jumo a fixed monthly retainer and allowance, and, in addition, his wages as an ordinary workman with a certain addition, called tindalage, for every day on which he actually worked as a tindal. The learned Commissioner found that a tindal like Jumo on the average worked 23 days in every month, under different employers, some times as a tindal sometimes as an ordinary workman, and thus earned Rs. 95-5-0 per month, and he computed the compensation due on this basis.

[37] Mr. Choithram for the appellants argued that the learned Commissioner erred in adopting this method. He argued that for the purposes of the Act the monthly wages of Jumo had to be computed as being restricted to the average monthly amount which Jumo earned from the appellants, which, Mr. Choithram argued, would be the retainer and allowance plus the wages which Jumo got for the eight days, including tindlage. Mr. Choithram contended that the general scheme under which compensation was payable by an employer under the Act and the words of S. 5 require us to accept his contention.

[38] In my view, Mr. Choithram has not been able to point to anything which can in any manner be regarded as supporting his argument. The method to be adopted in calculating the monthly wages of the workman in question is stated in S. 5. Clauses (c) and (a) of this section apply to cases where the workman was in the service of the employer during a continuous period of a month or more before the accident. These clauses admittedly and obviously did not, therefore, apply in the present case. As Jumo was only retained as a tindal, he could not be said to be continuously in the service of the appellants for the entire period during which he was retained as a tindal. On the facts of this case, it could not be asserted that Jumo was continuously employed by the appellants as a tindal, except during the periods during which he was employed by the appellants on consecutive days. The periods of such continuous employment were very short of a few days. We are, therefore, concerned here only with cl. (b), which applies

"where the whole of the continuous period of service immediately preceding the accident during which the workman was in service of the employer, who is liable to pay the compensation, was less than one month."

There are two alternative methods of calculation prescribed in cl. (b), the first of which

applies where there is another workman to be found who was employed "on the same work by the same employer" during the twelve months immediately preceding the accident. Presumably this would apply where there was another workman to be found similarly employed, that is to do the same kind of work, who had been in continuous service of the employer during the previous twelve months. There was no such other workman in the present case. Tindals could not be said to be continuously in the service of the employers who retained them, except during the periods when they were employed as tindals on consecutive days. The first of the two methods is, therefore, not applicable here. The second method, therefore, applies as "there was no workman so employed to be found".

[39] The actual words of cl. (b) which apply when the second method of calculating the monthly wages has to be applied are :

"The monthly wages of the workman shall be deemed to be the average monthly amount which, during the twelve months immediately preceding the accident, was earned by a workman employed on similar work in the same locality."

[40] The question before Commissioner, therefore, was simply this :

"What was the average monthly amount which a tindal like Jumo working in the same locality earned during the twelve months before the accident?"

[41] I am quite unable to see how it is possible to argue that in the present case this question could be correctly answered by finding the amount which Jumo used to earn on the average every month from the appellants alone. Mr. Choithram's contention appears to me to be plainly in contradiction of the plain terms of that part of cl. (b) which applies here. The Commissioner had to find "the average monthly amount" earned by a workman "employed on similar work in the same locality" as Jumo. The average to be found had to be the prevailing average during the twelve months immediately preceding. It would be clearly impossible, as a matter of arithmetic, to find what "the average monthly amount" earned by such a workman was unless one took into account all that the workman earned from all employers on the average during a month in the year under consideration. This is necessary implied by the term "the average monthly amount." I can see nothing, as I said before, in the scheme of the Act or in the words used, which support Mr. Choithram, and the plain grammatical meaning of the enacted words appear to me to contradict Mr. Choithram's contention.

[42] During the course of his argument, Mr. Choithram referred us to a number of English decisions where the corresponding English Acts had been construed. But having regard to the differences between the English enactments, which were construed in those decisions and the Act before us, I cannot see how any of these decisions in any manner help Mr. Choithram.

[43] For these reasons I agree that there is no reason for holding that the learned Commissioner erred in the method adopted by him.

D.H.

Appeal dismissed.

END

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ALL INDIA REPORTER

1949

[Vol. 36]

KUTCH SECTION

WITH PARALLEL REFERENCES TO

(1) 50 CRIMINAL LAW JOURNAL

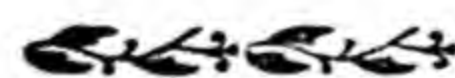


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KUTCH JUDICIAL COMMISSIONER'S COURT

1949

JUDICIAL COMMISSIONER :

The Hon'ble Shri R. S. Trivedi, I.C.S.

GOVERNMENT PLEADER ;

Shri K. K. Chhaya, B.A., LL.B.

PUBLIC PROSECUTOR :

Shri C. P. Pandya, Advocate, Kutch.

REPORTER :

Shri Manibhai Hiralal Dholakia, B.A., LL.B., Pleader, Bhuj.

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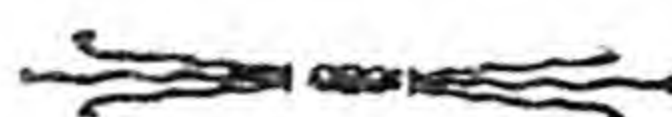
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Kutch J. C.'s Court



A. I. R. (36) 1949 Kutch 1 [C. N. 1.]

TRIVEDI J. C.

Soni Ganesh Karason — Appellant v. The Public Prosecutor and another — Complainants — Respondents.

Criminal Revn. Appln. No. 206 of St. 2005, Decided on 31st January 1949, from order of District and Sessions Judge, D/- 8th August 1948.

Criminal P. C. (1898), S. 514 — Forfeiture of bond — Liability of surety — Bond stipulating to produce accused whenever required and as often as required — Accused present on first hearing but absent on subsequent hearings — No order by Magistrate on surety on day of first hearing to remain surety for accused's future appearances — Bond held fulfilled and there could be no forfeiture.

A bond given required the surety to produce the accused whenever required and as often as required. The accused appeared for the first hearing before the Magistrate but remained absent on subsequent hearings.

Held that the surety's liability under the bond ended when he produced the accused before the Magistrate for the first hearing and there could be no question of forfeiture of the surety's bond because the accused failed to appear subsequently on days of hearing in the absence of any order on the day of first hearing on the surety by the Magistrate to remain surety for accused's future appearances. [Paras 5, 6]

(Desirability of providing penalty in bond and duty of Magistrate regarding disposition of accused persons appearing before him pointed out.)

Annotation : ('46 Com.) Cr. P. C., S. 514 N. 10.

J. C. Vaidya — for Appellant.

Public Prosecutor C. P. Pandya — for Respondent No. 2.

Order. — This is an application by a surety of an accused person against an order of payment of penalty of the bond to produce the accused person on the latter's failure to appear in the Magistrate's Court at Rapar. The accused person, it is alleged, was arrested by a line Customs Inspector while carrying silver across the border. The present petitioner then stood surety to produce the accused person whenever called upon to do so and as often as required.

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[2] The accused appeared for the first time before the Magistrate on the latter order. After that he failed to appear and remained absent, day after day of hearing. Thereupon the learned Magistrate ordered forfeiture of the surety's bond and payment of penalty thereof.

[3] First application against this was made before the Court of Session which rejected it.

[4] The bond was given by the surety to the Customs Inspector. It was for producing the accused whenever required and as often as required in general terms. This must be taken to include production before the Magistrate. Accordingly the surety did produce the accused there and fulfilled his bond. The Magistrate made no order regarding the disposition of the accused person. When the latter failed to appear again the learned Magistrate fell upon the surety.

[5] Now as far as the surety's liability under that bond is concerned it ended when he produced the accused before the Magistrate. There was no just order on him by the Magistrate to remain surety for accused's future appearance and there was no order on the accused person to furnish security for his further appearance in the Magistrate's Court. This was the learned Magistrate's mistake. He should have asked the accused person to furnish bail for appearance and then should have ordered on each subsequent date whether the accused would remain on the same bail as before.

[6] The present surety having fulfilled his bond, nothing remains to be forfeited by him. The order of payment of penalty by him is wrong. I allow this application and set aside the order of payment of penalty and discharge the petitioner. If any amount has been realised from him it shall be refunded to him.

[7] The learned Sessions Judge misinformed himself regarding the facts of this case.

[8] I hope that the learned Magistrate will learn from this incident and be careful in future regarding disposition of persons appearing before him.

[9] I also note that the bond given to the customs Inspector did not say in so many words that on failure to produce the accused person as aforesaid the surety would pay a certain amount to the Government or the King. The bond as it stood provided no penalty for such failure. I hope officers concerned will in future be careful about the language of bonds taken by them.

V.B.B.

Application allowed.

A. I. R. (36) 1949 Kutch 2 [C. N. 2.]

TRIVEDI J. C.

Heirs of Thacker Sundraji Kanji and others — Petitioners v. Shah Jeram Chela— Opposite Party.

Civil Revn. Appln. No. 3 of St. 2004, Decided on 24th February 1949, against order of Dist. Judge, D/- Chaitra Sud 14th Thursday of St. 2004.

(a) Civil P. C. (1908), O. 21, R. 11 — Application for re-execution — Balance due not shown — Application should be dismissed.

A decree-holder, seeking re-execution, has to show the balance due on the decree by exhibiting the result of the previous execution case. Where the decree-holder is unable to get a copy of the result of that execution as its record and register are not available, it is the decree-holder who takes all legal consequences and the application for execution must be dismissed.

[Para 3]

Annotation : ('44-Com.) Civil P. C., O. 21, R. 11, N. 9, 10.

(b) Hindu law — Debts—Sons' liability—Decree against father — Death of judgment-debtor—Sons inheriting nothing from father — Sons are not liable — Civil P. C. (1908), Ss. 50, 52 and 53.

Where the heirs of a deceased Hindu judgment-debtor inherit nothing from the deceased, they are not liable for their father's personal debts. [Para 4]

Annotation : ('44-Com.) Civil P. C., S. 52, N. 13.

(c) Provincial Insolvency Act (1920), Ss. 28 and 44 — Insolvency of Hindu father — Property completely liquidated—Sons are not liable for remaining debts.

Insolvency cannot be inherited. That is a personal quality. A Hindu insolvent's normal obligations end when his property is completely liquidated. Only as long as, he is not discharged, if he comes into possession of any assets the same can be seized to pay off the creditors. That does not apply to the insolvent's children. Thus the insolvent's sons are not liable for their insolvent father's remaining debts, if any, where no property of that insolvent has been left. [Para 5]

Annotation: ('46-Man.) Pro. Ins. Act, S. 28, N. 5; S. 44, N. 4.

(d) Provincial Insolvency Act (1920), S. 28 — Proceedings against insolvent — Dues can be realized only in insolvency proceedings.

No decree can be executed against insolvent in the normal Courts. Dues can only be realised in the insolvency proceeding and nowhere else, and that too only from the insolvent's assets, and not from anyone else's assets. [Para 6]

Annotation: ('46-Man.) Prov. Insol. Act, S. 28, N. 14.

Ramji R. Thacker — for Petitioners.

Manibhai H. Dholkia — for Opposite Party.

Order. — The judgment-debtors petitioners objected to execution of a certain money decree, decree against them, by the opposite party. The opposite-party had obtained that decree against the petitioners' father in St. 1969. It was a money decree for a personal debt. The opposite-party decree-holder, at once put the decree into execution. That execution terminated in St. 1973, with what result, we do not know. While that execution was pending certain creditors of the petitioners' father instituted proceedings against him in the civil Court in the nature of insolvency, although in Kutch there was not and is not any insolvency Act. In that proceeding the judgment-debtor's property was liquidated and the realisation was distributed rateably amongst the creditors, one of whom was the present decree-holder and who received in his share Koris 1153. The proceedings terminated there. The judgment-debtor was divested completely of his assets and in due course he died. His children when they grew up began earning their own livelihood. And at the present day the two petitioners have by dint of their own labour placed themselves in slightly enviable condition. That aroused the cupidity of the decree-holder and now after 30 years he seeks to re-execute the decree feeling confident that the sons of the deceased insolvent would feel pious obligations to their departed father's soul and would for that sake of that soul's rehabilitation clear him from the bane of insolvency by satisfying the decree-holder's inexorable demand. The sons, however, were not so obliging and objected to mixing up mundane matters with piety. Their objection was rejected by the learned executing Court and the rejection was confirmed by the appellate Court, the District Judge. The petitioners filed the present application in the form of a second appeal; but as in such a case second appeal does not lie, I have treated this as an application for revision there being only points of law involved in it.

[2] Various legal objections are raised in this application. I shall deal with them one by one.

[3] (a) The decree-holder has to show the balance due on the decree by exhibiting the result of the previous execution case. This is the correct legal position. The decree-holder's answer is that he is unable to get a copy of the result of that execution as its record and register are not now available. If that is so the decree-holder has to thank his own lethargy for 30 years for that. He cannot pass on that blame to the judgment-debtor's children. Actually it was not lethargy, but want of anything to realise the decretal dues from that caused the decree-holder

to lie under cover all this time. In any case it is the decree-holder who takes all legal consequences. For this reason alone the application for execution must be dismissed.

[4] (b) The second point is one of Hindu law, that of the pious obligation of heirs to pay off the debts of their progenitor. In British India this part of the law was enacted by statute as long as 1882, when heirs were made liable only to the extent of their heritage, if any and not otherwise. It is true that there is no such statute in Kutch and here it is still in uncodified stage. That, in my opinion, makes little difference in the present instance. The statute of British India in 1882 was necessitated by differing rulings of the High Courts. At the present day uncodified Hindu law is gleaned from rulings of the High Courts and the Privy Council. These things as well as uncodified law change in course of time. It would be a misfortune if they did not. Its notion in Kutch must also change, if it has not already done so. It is to be noted that at the time of the statute of 1882 (British India) High Courts there were already holding the enlightened view that only heirs were liable for debts of their predecessors. We must follow the enlightened view. Not to do so would be against public policy. The present petitioners inherited nothing from the original judgment-debtor. They are, therefore, not liable for their father's personal debts. This execution cannot stand against them and must be rejected.

[5] (c) There is an added fact here. The petitioner's father was an adjudged insolvent. Although there is no insolvency statute in Kutch, as a matter of fact civil Courts do administer proceedings in the nature of insolvency in Kutch. That was done in the present case. The original judgment-debtor's assets were seized by the Court and rateably distributed amongst all creditors who cared to apply for the same. Now insolvency cannot be inherited. That is a personal quality. The insolvent's normal obligations ended when his property was completely liquidated. Only as long as he was not discharged, if he came into possession of any assets the same could be seized to pay off the creditors. That does not apply to the insolvent's children. It would be monstrous, if it were so. Thus the present petitioners are not liable for their insolvent father's remaining debts, if any, no property of that insolvent having been left.

[6] The opposite party argues that the original judgment-debtor was not discharged in the insolvency proceeding, and so his liability remains. Now, if that man was not discharged before his death, it was because there is no insolvency statute in Kutch and for no other reason. However, if he or his soul continues to

be insolvent to the present day, no decree can be executed against him in the normal Courts. Any dues still left can only be realised in the insolvency proceeding and nowhere else, and that too only from the insolvent's assets, and not from anyone else's assets. For this reason alone, the present application for execution is untenable and must be rejected.

[7] I allow this application with costs. The order of the learned Subordinate Judge and that of the first appellate Court are set aside and the application for execution is rejected. The decree-holder will pay the petitioners' costs in both Courts below. Hearing fee for this application is assessed at Rs. 50.

V.B.B.

Application allowed.

A. I. R. (36) 1949 Kutch 3 [C. N. 3.]

TRIVEDI J. C.

Shah Motilal Maghji—Defendant—Appellant v. Khatri Lakshimidas Vishanji — Plaintiff—Respondent.

Small Cause Appeal No. 7 of St. 2005, Decided on 21st March 1949 from order of Sm. C. C. Judge, Mandvi, D/- 19th November 1948.

(a) Evidence Act (1872), S. 45 — Handwriting expert — Opinion of, is not conclusive proof.

An opinion of a handwriting expert cannot in law be accepted as conclusive proof. At best it can only be taken as an unconclusive aid in conjunction with other evidence. [Para 2]

Annotation : ('46-Man.) Evidence Act, S. 45, N. 6.

(b) Evidence Act (1872), S. 69 — Attesting witness dead — Proof as to his signature by comparison of handwriting is unwarranted.

When an attesting witness is dead, a Court is not justified in comparing the signature of the witness on the document with his agreed handwriting for the purpose of proving the signature of the witness on the document. Such a procedure of proving an attesting witness's signature is unwarranted by law. [Para 7]

Annotation : ('46-Man.) Evidence Act, S. 69, N. 3

Krishnalal N. Mankad — for Appellant.

Manharrai M. Mehta — for Respondent.

Judgment. — The plaintiff respondent sued in the small cause to recover money from the defendant on a hand note. The plaintiff purchased that note from the original lender. The note purports that by it the defendant Motilal Meghji borrowed Koris 250 on Maha Vad 3rd, Samvat year 1990 and that he promised to repay it with interest on demand. It does not say from whom the loan was taken, but the evidence is that the money was lent by Ramji Harakhchand, who sold the note to the plaintiff. That Ramji Harakhchand is the defendant's cousin sister's son. The note purports to have been signed by the defendant Motilal Meghji, written by Ramji Harakhchand and attested by as many as four witnesses. The defendant denied having taken the loan and having signed the hand-note. The Small Cause Court, however, decided that the

hand-note was genuine and decreed the suit. Hence, this appeal by the defendant.

[2] The only question is whether the hand-note was executed by the defendant. The defendant's signature was compared with that on that hand-note. A so-called expert did that and opined that the signature on the hand-note was of the defendant's. The decision in this suit is based solely upon that opinion. This reliance on opinion as to handwriting is by law unwarranted. The defendant's signature on the Vakalatnama was compared with that on the hand-note. That Vakalatnama is not before me, thanks to the strange unreasonable practice of the Courts in this province of getting rid of all original exhibited documents even when they are required for the purpose of their handwriting. I gather from the so-called expert's opinion that he found similarity in letters between the two specimens. Now this opinion is not sufficient. A forged signature will always be, as far as possible, made to look like a genuine one. As expert's business is to find out whether the alleged forged signature is a laboured one or a natural one and whether in unconscious parts there are similarities or dissimilarities of style and pressure and shape. In this case the expert seems to have examined only the latter part. He does not seem to have examined the former part. For this reason his opinion is lop sided. Even if he had done both his opinion cannot in law be accepted as conclusive proof. At best it can only be taken as an unconvulsive aid in conjunction with other evidence.

[3] I have before me the defendant's signature on the first notice to him. It is certainly similar to the signature on the hand-note. But that similarity is not sufficient. I do not know whether the signature on the hand-note is laboured or not. I shall leave this part of the evidence here.

[4] It was for the plaintiff to prove the execution of the hand-note by the defendant. The manner of doing this was quite obvious. The four attesting witnesses or such of them as were surviving were to be examined to prove the hand-note. In this the plaintiff failed.

[5] One man Shah Ramji Virchand was examined by the plaintiff. He said that the signature on the hand-note was not his. After he said this the plaintiff turned round and said that he had examined the wrong Ramji Virchand. This sort of somersault could not help him.

[6] One Popatlal Devchand is said to have attested the bond. He is dead. His son produced writing containing Popatlal's signature. That son denied the signature on the bond to be his father's. No one else who could recognise Popatlal's signature was examined.

[7] The learned Court below merely compared the signature on the bond with Popatlal's agreed handwriting and held that the signature on the bond was Popatlal's. This procedure of proving an attesting witness' signature is unwarranted by law.

[8] Similar remarks apply to the signature of Shamji Motichand on the bond. No evidence was led on the forth signature of Devchand Naranji.

[9] Firstly there was no evidence to prove execution of the bond. The learned Judge relied only on comparison of hand-writing, which was unreliable and in any case unconvulsive. On the other hand there are circumstances to indicate that the bond might be a forged one. It is in the form of an opening entry in a ledger, as is the practice in this country. But then such entry is being actually made in a book of account. In the present case the writing is on a scrap of paper of quarter size. It is torn from the notebook. In fact, the original creditor Ramji Harakhchand has no account book. Why was the bond then not in the ordinary promissory form without affecting to be an account?

[10] Secondly there is evidence that Ramji Harakhchand is a man of straw and always was a man of straw living upon borrowings. The learned Judge has ignored that part of the evidence.

[11] Thirdly Ramji Harakhchand is since recently on criminal terms with the defendant. The defence is that he being related to the defendant, instead of himself bringing a suit, he forged a document and sold it to the present plaintiff.

[12] In the result the bond is not proved and the suit must be dismissed with costs. I allow this appeal with costs accordingly, and dismiss the suit with costs. Before I close, I must comment on the state of the lower Court's record. The Judge's handwriting is perfectly illegible. It is ironical that he should decide genuineness or otherwise of other people's handwriting. I wonder whether the learned Judge realises that by writing absolutely illegible record of evidence and judgment he is doing injustice to the parties before him, apart from the injustice done to the chair he occupies. Does he not know that whatever he writes is for the world to see and understand and not for his own satisfaction? The writing of his copyist is no better.

[13] In this case it was the handwriting that was to be judged; and yet in sending the records to this Court, the various handwritings were withheld. In doing so the Court below and its staff have shown only contempt for their normal duties. I wish that they behave like intelligent beings and not like rusty machines and think on what they send up to a superior Court for being

judged. I desire that the learned Judge and his staff write only legible hand and send up a complete record with all material when called for on appeal or revision; otherwise they will expose themselves to disciplinary measures.

K.S.

*Appeal allowed.***A. I. R. (36) 1949 Kutch 5 [C. N. 4.]**

TRIVEDI J. C.

Thacker Murarji Surji — Defendant — Appellant v. Jayant Trading Corporation Ltd., Bombay — Plaintiff — Respondent.

Civil Revn. Appeal No. 99 of St. 2004, Decided on 3rd January 1949, from order of Asst. District and Sessions Judge, D/- 26th June 1948.

(a) Civil P. C. (1908), S. 115 — 'Case', meaning of — Decision on question of jurisdiction and maintainability of suit is a case and as such open to revision.

The word 'case' in S. 115 is not synonymous with a suit when an order is passed in the suit. A case can be a part of proceedings in a suit. The decision of a question whether the plaint should be rejected or returned to the plaintiff for want of jurisdiction is a case within S. 115 and as such open to revision.

[Para 1]

Annotation:—('44-Com) C. P. C., S. 115 N. 4 and 5.

(b) Civil P. C. (1908), O. 29 R. 1 — Suit by incorporated company — Plaint signed by attorney who is officer of company — Statement in plaint that he knows facts of suit and will be able to answer questions — Plaint is properly signed.

[Para 3]

Annotation:—('44-Com) C. P. C., 29 R. 1. N. 8.

(c) Civil P. C. (1908), O. 29 R. 1 — Suit by corporation — No provision in Kutch Civil P. C. — Indian law applies — Suit may be brought in name of corporation.

In the Kutch Civil P. C. there is no provision about incorporated companies. A practice has grown up to follow provisions of Indian Law so far as unprescribed procedure is concerned. That is a sound practice. Under the Kutch Civil P. C. what is just and proper can be done in absence of a specific provision in the code. In a suit by an incorporated company it is just and proper to treat the plaintiff as an individual of that name. Hence a suit may be brought in the name of the corporation.

[Para 4]

Annotation:—('44-Com.) C. P. C. O. 29 R. 1 N. 2.

(d) Civil P. C. (1908), S. 20 — Suit against private firm carrying on business in Bombay — Cause of action arising in Bombay — Its individual partners residing temporarily in Bombay and permanently in Kutch — Firm or their partners can be sued in either of the places.

[Para 6]

Annotation:—('44-Com.) C. P. C. S. 20 N. 4.

(e) Provincial Insolvency Act (1920), S. 28 — Suit against firm adjudicated as insolvent in Bombay — Kutch Courts have jurisdiction to entertain suit.

In Kutch there is no insolvency Act. Hence a suit against a firm which has been adjudicated as insolvent in Bombay is maintainable in the Kutch Courts as the firm is not to be treated as insolvent in Kutch.

[Para 7]

Annotation.—('46-Man.) Pro. Insolvency Act, S. 28 N. 14.

Premji B. Thacker—for Appellant.

Gopalji U. Bhansari—for Respondent.

Order.—This application for revision is against an order rejecting the defendant's prayer that the plaint be rejected or returned to the plaintiff as the Court had no jurisdiction to try the suit. The opposite party plaintiff raises a preliminary objection that this application does not lie under S. 115, Civil P. C. (Indian). His first ground is that if the suit was decided against the defendant he could on appeal against that decree take up the ground of want of jurisdiction. This fact does not make the lower Court's present order appealable as it stands. The second ground is that the lower Court's order is merely an interlocutory order and that it does not amount to decision of a case. I disagree. The defendant's prayer to the Court that the plaint be rejected or returned was in itself a miscellaneous judicial case. If the prayer was granted the order would have been appealable. In S. 115, Civil P. C., "case" is not synonymous with a suit when an order is passed in that suit. A case can be a part of proceedings in a suit. In the present instance the decision on the question of jurisdiction and maintainability of the suit should be taken as decision of a case. A revision application against such order is quite properly entertained under S. 115, Civil P. C. I reject this preliminary objection.

[2] The defendant petitioner had raised three objections against the suit. (i) That the plaint was not presented in the required form. (ii) That the Court had no jurisdiction to try the suit. (iii) That as the defendant had been adjudged insolvent no action against him lies. The Court decided all three issues against the defendant. I shall take them up one by one.

[3] (i) (a). The plaintiff is Jayant Trading Corporation, an incorporated company. The plaint has been signed by an attorney on behalf of the corporation. The defendant says that it should have been signed by a principal officer of the company and not by an attorney. The plaintiff's reply is that that attorney is an officer of the company and he has stated in his plaint that he knows the facts of the suit and will be able to answer the questions. That is enough. The plaint has been properly signed.

[4] (b) The plaintiff has not been properly described. The name of the corporation is not enough. Names of all share-holders should have been mentioned or Court's permission should have been taken for bringing the suit only by some of them in representative capacity. In the Kutch Civil Procedure Code there is no provision about incorporated companies. For the petitioner Mr. Thacker argues that the provision for firms in the Kutch Code should apply in the present case. I differ. The Kutch Code

is deficient in numerous respects. A practice has grown up to follow provisions of Indian Law so far as unprescribed procedure is concerned. That is a sound practice. If there was no relevant provision in the Indian Civil Procedure Code a corporation should have been treated as individual. Under the Kutch Civil P. C. what is just and proper can be done in absence of a specific provision in the Code. I hold it to be just and proper to treat the plaintiff as an individual of that name.

[5] I hold that plaint is in proper form and decide the first issue against the petitioner-defendant.

[6] (ii) The defendant's arguments is that as the defendants reside in Bombay, that as their firm exists only in Bombay and that as the cause of action arose wholly in Bombay the suit does not lie in Kutch. This appears to be a formidable argument. It seems to be a fact that the firm Bhawanji Ravji does not exist in Kutch. It also is a fact that the plaintiff's transaction was with the firm. It was a private firm and three persons were its joint owners. The question is whether a suit can lie against the owners wherever they have residence. My reply is that it does. The firm is nothing apart from its three owners. Its name is a misnomer. As it is a private firm the place of residence of the defendant in this suit must be taken to include the residence of its three owners. It is an admitted fact that the three owners have their permanent residence in Kutch Province, that they reside in Bombay only for business purposes and that they come every year to Kutch and reside for some time in their homes here. This means that the defendants have two residences, one in Kutch and the other in Bombay. They can be sued in either of the places. Their firm can also be sued in either of the places. I therefore, decide that the Court below has jurisdiction to try this suit.

[7] (iii) It is a fact that at their creditors' instance the defendants' firm have been adjudged insolvent in Bombay. Their property has been vested in the official receiver at Bombay. In Kutch, however, there is no Insolvency Act. In my opinion, the defendants would be able to dispose of their property in Kutch notwithstanding the insolvency proceeding in Bombay. That should be taken as the criterion. I doubt whether a purchaser from the official receiver at Bombay would be able to enforce his claim here against the defendants. If the defendants can resist his claim here there should be nothing to ban the plaintiff from suing the defendants here. The Court below, was, therefore, right in rejecting the defendants' contention that the insolvency proceeding in Bombay was a ban to

their being sued there. They are not to be treated as insolvents here and the suit lies.

[8] The result is that this application for revision is dismissed with costs.

K.S.

Revision dismissed.

A. I. R. (36) 1949 Kutch 6 [C. N. 5.]

TRIVEDI J. C.

*Jethi Lalji Kanji—Plaintiff — Appellant
v. Ghandhi Karson Ramji — Defendant — Respondent.*

Appeal No. 6 of St. 2004, Decided on 3rd January 1949, from order of Sm. C. C. Judge, Bhuj, D/- 22nd September 1948.

Civil P. C. (1908), S. 34—Defendant making purchases from plaintiff, a wholesaler in tobacco — Some amount remaining unpaid for long time — Suit by plaintiff — Interest not payable in absence of contract — Interest to be payable from date of suit if defendant failed to pay on demand or denied his liability.

The defendant, a retailer, made purchases from time to time from plaintiff, a wholesaler in tobacco. He left some amounts unpaid for a long time. In a suit for balance remaining unpaid and for interest by plaintiff:

Held, that interest was not payable in the absence of any contract. Cutch collection of usages and customs which was not a statute but intended to be a guide to Courts did not provide for payment of interest. Interest would be payable only from the date of the suit as compensation if the defendant failed to pay on demand or denied his liability. [Para 4]

Annotation: ('44-Com.) C. P. C., S. 34, N. 3, 7, 8.

Jamiatrai G. Vaidya — for Appellant.

Kantilal S. Vyas — for Respondent.

Judgment. — This is an appeal against a judgment disallowing interest on unpaid prices for purchases made by the defendant respondent. The plaintiff appellant is a wholesaler in tobacco. The defendant is a retailer in the commodity. He used to make purchases from time to time from the plaintiff for the purpose of his retail business. He left some amounts unpaid for a long time. He paid some amounts long after he made the purchases. The plaintiff sued him for the balance of price, left unpaid and for interest on the unpaid balance as well as on sums not paid within due time. The Court below allowed only the balance of unpaid prices, which was admitted and refused the claim of interest. Hence this appeal.

[2] There was no contract between the parties that interest would be paid on prices left unpaid after a certain period of grace. The plaintiff seeks to rely on local custom that interest is usually payable on prices left unpaid after the period of grace, thus implying a contract according to that custom. For the plaintiff Mr. Vaidya first referred to an article in the Cutch collection of usages and customs. That collection is not statute though it was intended to be a guide

to Courts. That collection merely furnishes the period of grace within which prices are expected to be paid for purchases of various commodities, after which the seller can make demand and have recourse to legal action. It does not say that interest is payable on sums left unpaid after the period of grace. Mr. Vaidya then referred to two decisions of Courts in Kutch state which allowed interest in such circumstances. Only one of them spoke of existence of a custom like that. Now existence of a custom like that is primarily a question of fact which the claimant is bound to prove, if it is not admitted. It does not appear that the former decision was based on such evidence. It will, therefore, be unsafe to follow that decision as a guide. There are other decisions which conflict with this one.

[3] In the present case the learned Judge of the Small Cause Court has observed in his judgment that there is a custom amongst traders that in transactions between themselves they pay interest for sums left unpaid after the period of grace, but that this custom does not apply to transactions between a wholesaler and a retail shop-keeper. I, however, do not find evidence to that effect on the record. The plaintiff failed to prove the custom.

[4] Mr. Vaidya invites me to remand the case for taking evidence on the question of custom, as the question is one of importance. I don't think that the question is one of importance. Indian Law is about to be applied to this province. Future decisions will follow rulings of the High Courts in India. For the present I shall only say that interest is not payable in absence of a contract to that effect. It would be payable only from the date of the suit as compensation if the defendant failed to pay on demand on or denied his liability. In the present case, the defendant offered to pay the unpaid balance of prices without interest, which the plaintiff did not accept.

[5] I decide that in this case the defendant is not liable to pay interest on the unpaid balance of prices for purchases made by him from the plaintiff.

[6] I dismiss this appeal with costs.

D.H.

Appeal dismissed.

A. I. R. (36) 1949 Kutch 7 [C. N. 6.]

TRIVEDI J. C.

Rabari Vershi Mala—Plaintiff — Appellant v. Rabari Karamshi Ratna—Defendant —Respondent.

Second Appeal No. 190 of V. S. 2004, Decided on 26th April 1949, from appellate decree of Dist. Judge, D/-11th September 1948.

(a) Kutch Courts Order (1948), Ss. 32 and 44 — Money suit for less than Rs. 1000 — Second appeal in, filed before order came into force — It can be continued as such under S. 44.

Even though no second appeal lies in money suits worth less than Rs. 1000 under S. 32, Kutch Courts Order, a second appeal filed in such suit and admitted before that Order came into force on 28th December 1948 must be continued as such under S. 44 of that Order.

[Para 1]

(b) Penal Code (1860), S. 383 — Use by caste leader of his good offices to get excommunicated person re-admitted into caste — Remuneration accepted — No extortion.

[Para 8]

Annotation : ('46-Man.) Penal Code, S. 383, N 1.

Ramji R. Thakkar — for Appellant.

Soorji U. Bhansali — for Respondent.

Judgment. — This being a second appeal in a money suit whose value is less than Rs. 1,000, the respondent raised a preliminary objection to the hearing of this appeal. Under S. 32, Kutch Courts Order, 1948, second appeal does not lie in money suits worth less than Rs. 1,000. But this appeal was filed and admitted by the High Court, the predecessor of this Court, before the Kutch Court's Order was brought into force. In the original Order the date of commencement of the Order is 27th November 1948 and this appeal was filed on 8th December 1948, but by a later notification published in Kutch Gazette this Order came into force from 28th December when I took my seat in the Judicial Commissioner's Court. As this appeal was in order on 8th December 1948, it must be continued as such under S. 44, Kutch Court's Order, 1948. This objection is rejected.

[2] The appellant plaintiff sued for recovery of money Koris 925 from the defendant, saying that he lent that sum to the defendant on the latter promising to repay it to him within a fortnight, which he did not comply with. The defendant said that he did not take any sum of money from the plaintiff. The plaintiff's story is that the defendant who is a leader of the plaintiff's caste, wished to borrow Koris 1500 from the plaintiff, that the plaintiff refused to accommodate him, that thereupon the defendant assembled his castemen and had the plaintiff promptly excommunicated, that this drove the plaintiff into the defendant's arms, that thereupon the defendant renewed his demand of a loan, that the plaintiff expressed his inability to advance so much, that ultimately the defendant agreed to take Koris 925 only and promised to repay it within a fortnight, which promise he did not keep. Thus a story of blackmail was related; but the suit was on a contract to repay a loan of Koris 925.

[3] The learned trial Court found as a matter of fact that the defendant did take Koris 925 from the plaintiff, but it did not decide whether

this was a loan with promise to repay or an outright present, being blackmail. It held that in either event the defendant was bound to refund the money to the plaintiff and, therefore, decreed the suit.

[4] On first appeal, the learned District Judge held that the trial Court was wrong in decreeing the suit without definite finding whether there was a promise to repay or not. He then proceeded to consider the evidence himself and found that the defendant did receive from the plaintiff Koris 925, but that there was no promise to repay and that this money might have gone to the coffers of the caste. He held that if the plaintiff failed to establish a promise to repay, the suit as framed could not succeed; and therefore dismissed the suit.

[5] In my opinion the learned District Judge was perfectly right in his view that the plaintiff could only succeed if he proved his case of a loan with a promise to repay and that if the plaintiff voluntarily paid this money away outright as a price for re-entering the caste he could not sue to recover that money.

[6] The points for decision are. (1) Did the defendant take from the plaintiff Koris 925. (2) Did the defendant promise to repay this sum?

[7] (1) Both the Courts below have held that the defendant did take Koris 925 from the plaintiff, after the latter was excommunicated and that thereafter the plaintiff was taken back into the caste. There is oral evidence of witnesses to prove this payment. As it has been believed by the two Courts, it is not for me to differ from them without such reasons as did not occur to those Courts. I, therefore, confirm this finding.

[8] (2) The plaintiff could either sue on a contract or could sue to recover money extorted from him by commission of a crime. Here we have no evidence of commission of a crime. The plaintiff requested the defendant to use his good offices so that he might be readmitted into the caste. Thus the defendant accomplished and took Koris 925 as remuneration. This cannot be called extortion, and the plaintiff did not base his case on extortion either. He had, therefore, to prove the promise to repay.

[9] On this point the learned trial Court gave no finding and left it undecided. The learned District Judge found that there was no such promise. And I agree with him. I do not believe the earlier part of the plaintiff's story that the defendant got the plaintiff excommunicated merely because the latter would not pay him a present or tribute. The plaintiff did not give any good reason for his excommunication. Surely there must be plausible ground or allegation for

it. The plaintiff chose to keep it confidential. The defendant did not disclose it either.

[10] Would the defendant have staged all this elaborate force of excommunication and readmission merely for a loan of Koris 925 to be repaid within a fortnight? That is improbable. I can understand his taking a long term loan or an outright present. The plaintiff did not know after all these negotiations why the defendant was in such pressing need for so short term a loan. If a man is so powerful as to have the plaintiff excommunicated without reason, he is not in the need of a subterfuge to pocket this money. He can straightway ask for a gift and would get it if the plaintiff wished to remain in the caste. I do not believe that he put up a pretext of borrowing.

[11] This was an oral transaction and the evidence to prove it is all oral. It should be decided on probabilities. Considering these circumstances and findings of facts by the two Courts below I decide that there was no promise to repay. The result is that I dismiss this appeal with costs. The first appellate Court's decision is confirmed.

K.S.

*Appeal dismissed.***A. I. R. (36) 1949 Kutch 8 [C. N. 7.]**

TRIVEDI J. C.

Varand Gabha — Accused — Appellant v. Public Prosecutor — Respondent.

Reference No. 5 of St. 2005, Decided on 6th April 1949, made by Dist. and Sessions Judge, D/-24th January 1949.

Criminal P. C. (1898), S. 350 — Transfer of Magistrate — Accused entitled to demand trial de novo.

Whenever a Magistrate is transferred and a new Magistrate takes his place the accused has a right to demand trial de novo and the Magistrate is bound to comply with such request. [Para 2]

Annotation: ('46-Com.) Criminal P. C., S. 350, N. 9, 11 and 12.

Chhotalal B. Thacker — for Appellant.

C. P. Pandaya, Public Prosecutor in person.

Order. — Heard petitioner in support of the reference and the Public Prosecutor for the Crown who does not oppose the reference. This reference is accepted for the reasons stated therein. When retrial was ordered on appeal the lower Court was bound to abide strictly by that Order.

[2] Whenever a Magistrate is transferred and a new Magistrate takes his place the accused has a right to demand trial de novo and the Magistrate is bound to comply with such request. I, therefore, direct that the Magistrate of Anjar will try the case against Varand Gabha Khimji and others afresh from the beginning.

D.H.

Reference accepted.

A. I. R. (36) 1949 Kutch 9 [C. N. 8.]

TRIVEDI J. C.

Sundarbai and others—Defendants—Appellants v. Kanbi Mavji Arjan — Plaintiff — Respondent.

First Appeal No. 109 of St. 2004, Decided on 27th January 1949, from order of Dist. Judge, D/- 8th October 1948.

(a) Kutch Civil P. C., Ss. 280 and 333 — Suit for recovery of possession — Decree — Appeal lies — Civil P. C. (1908), Ss. 2 (2) and 96.

Section 333 is like S. 9, Specific Relief Act, except that it does not contain the provision that no appeal shall lie against the order. Section 9 mentions a suit to recover possession. Hence a final order made thereon would be considered to be a decree under the Civil P. C. and appealable as such. Even if the suit be treated as a miscellaneous judicial case under S. 280, an appeal lies against all final orders and is therefore admissible under S. 280. [Para 2]

Annotation : ('44-Com.) Civil P. C., S. 2 (2) N. 5.

(b) Kutch Civil P. C., S. 333 — Person purchasing land but resisted on first attempt to obtain possession — There is no possession and dispossession — Person not entitled to protection under S. 333 — Specific Relief Act (1877), S. 9.

Where a person purchases land from another but is resisted on the first attempt to obtain possession, there is no possession and dispossession. For dispossession, possession must have endured before that so as to make it an already accomplished fact and that possession must have been based on some right. Mere leaving a plough and manure on the land would not constitute enduring possession which alone deserves protection under the section. [Para 5]

Annotation : ('46-Man.) Specific Relief Act, S. 9, N. 1 and 2.

Padmakant P. Vaidya — for Appellants.

Karamchand D. Shah — for Respondent.

Judgment.— The respondent-plaintiff filed a suit for recovery of possession of certain field of which, he alleged, he was dispossessed by the defendants. This was under S. 333, Kutch Civil P. C., a provision similar to S. 9, Specific Relief Act. The learned District Judge below gave possession. An objection is taken to this appeal that it does not lie and that the aggrieved party's relief is by way of a regular title suit as provided in S. 333, Kutch Civil P. C.

[2] Now this S. 333 of the Kutch Code is like S. 9, Specific Relief Act except that it does not contain the provision that no appeal shall lie against the order. That absence of such provision makes all the difference between the two. A case like this is termed a suit in S. 9, Specific Relief Act. Hence a final order made thereon would be considered to be a decree under the Civil Procedure Code and appealable as such unless an appeal was specifically barred as in that section. Even if it be treated as a miscellaneous judicial case under S. 280, Kutch Civil P. C., an appeal lies against all final orders in cases, unless such appeal is specifically barred and is, therefore, admissible under S. 280 of the Kutch Code. The objection is overruled.

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[3] Now I come to the facts of the case. The plaintiff-respondent's case is that in Falgun 2002 V. S. he contracted in writing to purchase the suit land, arable land, from defendant 1 for Koris 6700 ; paid her Koris 100 and obtained possession of the land on that day. He began cultivation on it. Then 18 days later he was turned out of the land and was dispossessed. He at once brought this suit. The defendants denied the contract and delivery of possession and possession by the plaintiff. The suit was, however, decreed. Hence this appeal.

[4] I think that the facts of this case are so patent that it must be decided on probabilities. The plaintiff alleged possession and dispossession within 18 days, and on the 20th day he filed this suit. The very next day an officer of the Court was taken to the land and there shown a plough and manure on it. He said that the plough was his and that he had thrown the manure there.

[5] Now mere leaving a plough and manure on the land does not constitute enduring possession, which alone deserves protection under S. 9, Specific Relief Act. To me it seems quite clear that the plaintiff was resisted on the first attempt to possess the land. That is not called possession and dispossession. For dispossession, possession must have endured before that so as to make it an already accomplished fact; and that possession must have been based on some right, otherwise every trespasser would claim relief under S. 9, Specific Relief Act, which surely was not intended.

[6] In this case the defendant denied that she delivered possession of the land to the plaintiff. She was having the land cultivated by a cultivator and that man said that he had continued in possession of the land.

[7] Then again if the defendants had really dispossessed the plaintiff they would not be so foolish as to preserve on the land tell tale evidence of the plaintiff's plough. They would have caused its removal on disappearance from the land. It seems, therefore, likely that the plaintiff planted his plough there in order to show it to the Court's officer. At that time the defendant had already begun sowing operation on the land.

[8] From the plaintiff's own deposition I am satisfied that as soon as his father tried to cultivate the land he was prevented by the defendant who asked him to pay first and then cultivate the land. Under this circumstance the plaintiff's attempt which failed to possess the land does not deserve protection under S. 333, Kutch Civil P. C.

[9] The plaintiff has made an attempt by this suit to put the other party into the wrong.

If his case was true, he should have brought suit for specific performance of a contract.

[10] I allow this appeal with costs. I order that the suit be dismissed with costs. Pleader's fee for hearing this appeal is fixed at Rs. 25.

D.H.

Appeal allowed.

A. I. R. (36) 1949 Kutch 10 [C. N. 9.]

TRIVEDI J. C.

Jadeja Godji Modji—Defendant 1—Appellant v. Jadeja Bhawsangji Jagatsinghji and others, Plaintiffs and others, Defendants 2 to 10 — Respondents.

Appeal No. 40 of St. 1968, Decided on 7th January 1949.

(a) Sale—Conditional sale in Kutch — Government order forbidding such sale does not apply to deed made before St. 1914.

It was for the first time in St. 1914 that conditional sale was held to be against public policy and was forbidden by the Government's order in Kutch. That order does not apply to a document made before that date. [Para 7]

(b) Hindu law — Widow — Alienation — Legal necessity — Sale deed executed 100 years before suit — Direct evidence as to legal necessity not available — No attempt to claim equity of redemption or oppose alienees' act in appropriating property as their own — Held that this might be taken as acquiescence into legal validity of document and based on facts of legal necessity — Special custom against Hindu law, in the case of Rajput widow, held not proved. [Paras 8, 9]

(c) Transfer of Property Act (1882), Ss. 58 and 60 — Mortgage by conditional sale executed in St. 1867—No right in Kutch to redeem after expiry of stipulated period.

In Kutch, in the case of a mortgage by conditional sale, executed in St. 1867, there is no right of redemption after the expiry of the specified time limit. [Para 11]

Annotation: ('45-Com.) T. P. Act, S. 58, N. 31.

K. N. Mankad — for Appellant.

U. K. Gor — for Respondents.

Judgment.— This appeal is against a redemption decree in a mortgage redemption suit. The plaintiffs/respondents are heirs of a Rajput lady called Rajba. She first mortgaged the suit property in "chittham" form with the Jagirdar of Vandhia, the defendant-appellant in St. 1865 for Koris 400. She then made a second similar mortgage in 1866 on the same property in favour of the same Jagirdar for Koris 800 odd. The defendants are in possession of the property since then. The suit was for redemption of those two mortgages.

[2] The defendants are the Jagirdar of Vandhia who has appealed and his cousins who actually possess the property now as a result of partition with the Jagirdar. The defendant appellant said that in 1866 Rajuba executed a third document in his favour in respect of the same property. That was called "Avadh Aghat" or a conditional sale, the time limit being 12

months. The consideration was 500 Koris besides the circumstances. The consideration was not repaid within that period and so the conditional sale became absolute in 1867 St. The present suit was filed in 1966, a hundred years later; the plaintiffs had no equity of redemption left.

[3] During trial the plaintiffs further contended that a Rajput widow, which Rajuba was, had by custom no right to sell her husband's son's property; that the third document was not executed by Rajuba and that it was without legal necessity. It was, therefore, inoperative. The learned original Court came to various findings; some of which are: (i) The document of conditional sale was against public policy and unenforceable; (ii) that document was without legal necessity; (iii) Rajuba had no legal rights to alienate the property in that fashion; (iv) that document must be taken as genuine; (v) conditional sale amounts to a mortgage and once a mortgage always a mortgage, so the plaintiff had a right to redeem that. The decisions of that Court were: (1) The document of conditional sale is unenforceable; (2) the plaintiffs will get back the property on payment of Koris 1,250 being the total of the considerations of the two earlier deeds of mortgage; (3) as the recipient of the document of conditional sale was the Jagirdar of Vandhia, he will compensate the other defendants to whose share the property has since fallen for the loss of this property.

[4] Defendant 1 the Jagirdar has appealed. The plaintiffs contest the appeal. The defendants/respondents do not appear.

[5] I shall first dispose of the third decision briefly. That decision is outside the scope of this suit. If the customers (*sic*) wish to repartition their property on account of loss of this one, that is their look out and not of the Court in this suit. I set this part of the judgment aside.

[6] I shall now take up the first decision and the findings on which it is based.

[7] I. It was for the first time in St. 1914 that conditional sale was held to be against public policy and was forbidden by the Government's order. That order does not apply to the present document which was made 48 years before that. The learned Court below has erred in applying that order.

[8] II. Rajuba being a Hindu widow she could under the ordinary Hindu law alienate or charge her limited property only for legal necessity. Now that document was executed 100 years before this suit was filed and at the time of trial the Jagirdar defendant being a minor a manager appointed by the State was representing him in the litigation. It was not possible

for the manager to prove that the document was for legal necessity. None of the plaintiffs examined himself to prove that the document was without legal necessity. The learned Court below observed that the two earlier documents mentioned necessity, but this third one did not. From that Court inferred that the third document was without legal necessity. Such inference is not justifiable. After 100 years, it was impossible to adduce direct evidence on that point. During that long period the successive generations after Rajuba took no steps to claim the equity of redemption or to oppose the defendants' act in appropriating the property as their own during the partition between them. This may be taken as acquiescence into the legal validity of the document and based on facts of legal necessity. This point should, therefore, be decided in favour of the validity of the document. I decide that the document was for legal necessity.

[9] III. What the plaintiffs pleaded was a special custom against the ordinary Hindu law. In order to prove it, two men have been examined. They simply said that a Rajput widow has no right to alienate her husband's or son's property. This is not the manner of proving a custom of this sort. No incidence of this custom has been cited. It does not appear that there was adjudication upon this question at any time before. No instances of successful plea of this custom outside the Court have been cited. Under these circumstances, I hold that the custom has not been proved. The ordinary Hindu law will, therefore, apply in this case.

[10] IV. The respondent wishes to defend the lower Court's judgment by attempting to show that the document is not genuine. He has a right to do so. The learned Court below found that all three documents were written by the same person and were attested by same witnesses. These are good grounds for taking the third document to be genuine. The respondent points to certain entries in the revenue accounts of the Jagirdar, wherein the suit property is described as Rajuba's property upto 22 years after the third document of 1866. It is argued that these entries indicate that the property was not there considered as the Jagirdar's and that, therefore, the third document is not genuine. There is an explanation of these entries. The suit property is 1/36th share of the Jagir in village Vandhia. Other shares in the village were otherwise acquired or distributed. The appellant argues that the suit property was only described as Rajuba's property for the purpose of identification and not to specify its character. I accept this explanation. The partition that followed took this property to be the Jagirdar's absolutely. I decide

that the document was duly and validly executed by Rajuba.

[11] V. That conditional sale is a mortgage, that the right to redeem it subsists even after the time limit mentioned therein and that the conditional purchaser should have to foreclose the mortgage by suit in order to call the property his absolute is comparatively recent law. It is clear after the T. P. Act, 1929. Before that decisions varied. Upto 1864 A. D. it was held in Bombay that at the expiry of the specified time limit the property automatically became absolutely the purchaser's. That was the state of law at the relevant period with which we are concerned, i. e. St. 1867. The Kutch Shresta Sangraha says that that was exactly the usage in this State. There is no law as T. P. Act in this Province. The practice is to follow Indian decisions and the local usage. In this case the Indian decisions and the local usages at the relevant period concur. I, therefore, decide that after lapse of the specified time the plaintiffs lost their right to redeem this property on account of the force of the third document.

[12] Accordingly I set aside the original Court's decision and decide that the document of conditional sale transferred by effect (efflux?) of stipulated time absolutely to the defendant. The plaintiffs have no right to redeem the property now left to them.

[13] There is one more point, which I should touch before closing this judgment. That is about the amount payable by the plaintiffs to redeem the property. On the basis of the first two documents it should be the total of their considerations, viz. Koris 1250 as ordered by the learned Court below and nothing more, as no interest can be considered to be due on this total sum, the property having been considered still worth Koris 500 in that same year after allowing for the earlier encumbrances. If the third document was added as a third mortgage, the amount payable by the plaintiffs would increase by Koris 500.

[14] In the result I allow this appeal with costs against the plaintiffs-respondents and ex parte without costs against the defendants respondents. I order that the suit be dismissed with costs against all defendants who appeared and contested it and without costs against the rest, if any.

V.B.B.

Appeal allowed.

A. I. R. (36) 1949 Kutch 11 [C. N. 10.]
TRIVEDI J. C.

The Kutch Government — Appellant v. Gosai Lakhamangar Kalyangar — Accused — Respondent.

Criminal Revn. Appln. No. 246 of St. 2005, Decided on 28th February 1949, against order of Magistrate, Bhuj, D/- 21st January 1949.

Kutch Penal Code, S. 409 — Postal peon misappropriating amount of two money-orders and forging money-order acknowledgments — Sentence of rigorous imprisonment for 15 days and fine of Rs. 117 held insufficient — Penal Code (1860), S. 409.

Where a postal peon entrusted with deliveries of money-orders misappropriated amounts of two money-orders and forged signatures on the money-order acknowledgments, a sentence of rigorous imprisonment for 15 days and fine of Rs. 117 under S. 409 is insufficient as it is a serious crime. In such a case the accused commits two offences one of which only can be a first offence, not both. [Paras 1 and 2]

Annotation : ('46-Man.) Penal Code, S. 409 N. 4.

K. K. Chhaya, Addl. P. P. — for Appellant.

Karamchand D. Shah — for Respondent.

Order. — This is an application for enhancement of sentence. The prisoner is present in Court and is also represented by a pleader. He was a postal peon entrusted with deliveries of money-orders. He misappropriated amounts of two money-orders amounting to Rs. 90-12-0 and forged signatures on the money-order acknowledgments. He admitted his guilt and was convicted of offences of criminal breach of trust and forgery etc. He was sentenced to rigorous imprisonment for 15 days and fine of Rs. 117 only under S. 409, Penal Code. This sentence is pensile and I am surprised that in a case of this gravity such a sentence as this is passed by a 1st class Magistrate.

[2] The cause shown is that the prisoner pleaded guilty, that he is the only support of his family, and that this is his first offence. It is clear that in this case the accused committed two offences; only one of them can be a first offence, not both.

[3] Sentence has to be sufficient to deter other public servants in that capacity. It is a serious crime. I enhance the sentence to rigorous imprisonment for one year under S. 409, Kutch Penal Code I also maintain the fine, which I understand has been paid. Issue a revised warrant.

[4] I note that the learned Magistrate has omitted to mention in the charge the probable date of its commission. I draw his attention to this defect and hope that in future he will take care to mention the time of commission of an offence as well as its place and manner.

D.H. *Sentence enhanced.*

A. I. R. (36) 1949 Kutch 12 [C. N. 11.]

TRIVEDI J. C.

Kutch Government — Appellant v. Gosai Lakhamangar Kalyangar — Accused — Respondent.

Criminal Revn. Appln. No. 247 of St. 2005, Decided on 28th February 1949, from order of Magistrate, Bhuj, D/- 20th December 1948.

(a) Penal Code (1860), Ss. 409 and 468 — Postal peon entrusted with delivery of money-orders mis-

appropriating amounts of money-orders by submitting forged acknowledgments — Sentence of one month's rigorous imprisonment is not adequate — Deterrent sentence is called for in such cases — Kutch Penal Code, Ss. 409 and 468 [Para 4]

Annotation : ('46-Man.) Penal Code, S. 409 N. 4, S. 468 N. 1.

(b) Criminal P. C. (1898), S. 545 — Sentence of imprisonment only — Court cannot order accused to pay compensation — It can only be awarded out of fine.

Where the Court merely passes a sentence of imprisonment without any fine it has no power to order the accused to pay compensation to the injured party. The proper procedure is to impose fine and to order compensation to be paid out of the fine. [Para 5]

Annotation : ('46-Com.) Cr. P. C., S. 545 N. 2.

K. K. Chhaya, Addl. P. P. — for Appellant.

Karamchand D. Shah — for Respondent.

Order. — This is an application for enhancement of sentence. The convicted prisoner is present in Court to show cause. He is also represented by a pleader.

[2] The prisoner was a postal peon. As such he was entrusted with money-orders for delivery. He misappropriated amounts of two money-orders totalling Rs. 100 and submitted forged acknowledgments. He was convicted of offences under Ss. 409 and 468, Kutch P. C., etc. He was sentenced under S. 468, Kutch P. C. only to rigorous imprisonment for one month. This sentence is pensile. I am surprised that a Magistrate of the first class passed such a sentence in a case of this gravity.

[3] The cause shown by the prisoner is that he pleaded guilty, that he is the only support of his family and that this was his first offence. It is not correct to say that this was his first offence. Here are two distinct offences in respect of two money-orders. Simultaneously in another case he was convicted of misappropriation of two other money-orders. Every one of these four could not be a first offence.

[4] I think that deterrent sentence is called for so that other public servants in that capacity may have an example before them. I enhance the sentence to rigorous imprisonment for one year under Ss. 468 and 409, Penal Code. In view of the fact that the prisoner was five months in jail as undertrial prisoner I make this sentence concurrent with that passed in *Kutch Government v. Lakhamangar Kalyangar*, Cri. Revn. Appln. No. 246 of 2005 St. : (A. I. R. (36) 1949 Kutch 11).

[5] I find that the learned Magistrate passed an order of payment of compensation to the payee by the accused person. There is no such procedure as that in Criminal Procedure Code. The procedure is to impose fine and to order compensation to be paid out of fine. I correct the Magistrate's order. I sentence the accused Lakhamangar under S. 409, Penal Code, to pay

fine Rs. 100 in addition to substantive sentence above, in default to further rigorous imprisonment for four months. The fine, if realised, shall be paid to the two payees of the two money-orders equally as compensation.

K.S.

*Sentence enhanced.***A. I. R. (36) 1949 Kutch 13 [C. N. 12.]**

TRIVEDI J. C.

Jadeja Versalji Abhesangji and others—Defendants 1 to 3—Appellants v. Shah Khimji Velji, Plaintiff and another, Defendant 4—Respondents.

First Appeal No. 112 of 2004 V. S., Decided on 21st April 1949, from decree of Assistant District Judge, D/- 18th October 1948.

(a) Registration Act (1908): (case from Kutch), Ss. 17 and 49—Farkati worth more than 500 Koris requires to be registered—If not registered it cannot be used in evidence.

A *Farkati* is a document creating or extinguishing a right in property. Where the *Farkati* is worth more than 500 Koris its registration is compulsory. In the absence of registration the document creates no legally enforceable right and it cannot be used in evidence.

[Para 9]

Annotation: ('45-Com.) Registration Act, S. 17, 84, Pt. 1a; S. 49 N. 2 Pts. 1, 2.

(b) Transfer of Property Act (1882), S. 53A—Section not to be used as weapon of offence by plaintiff to recover possession.

Under S. 53-A, a document not legally completed can be used to protect possession created or explained by it as against a contractor. It cannot be used as a weapon of offence to recover possession even from the contractor, still less can it be used to recover possession from a person who does not claim from the contractor.

[Para 10]

Annotation: ('45-Com.) T. P. Act, S. 53A N. 13 Pts. 2 and 3.

(c) Hindu law—Joint family—Partition—Members of joint family separating—Some property still kept joint—Coparcenary not to continue in such property.

Coparcenary always presumes a joint family and for the purpose of inheritance by survivorship it is coparcenership by birth which matters and not obstructed coparcenership. Joint property is not the same thing as joint family property of coparceners. Where the members have separated the fact that some property was still kept joint does not continue coparcenary or joint familyship in that property.

[Paras 13 and 14]

Ramji R. Thakkar—for Appellants.

Krishnalal N. Mankad—for Respondent 1.

Judgment.—The plaintiff-respondent sued for recovery of possession of certain residential property from the defendants on declaration of his title. This property was acquired in V. S. 1947 by one Nagshi Dhanani and his two brothers from the defendants by agreement and free grant. It seems that for the purpose of developing the village, Asambia Nagshi and his brothers were invited to come to the village, build houses there and reside there. The grant was practically free, inasmuch as no premium nor any rent was

reserved. The grant was subject only to payment by the new comers as certain customary and occasional cesses in kind, in their capacity as the grantor's subjects. Each party executed an agreement in favour of the other. From these written agreements, it appears that it was not exactly the grantor's entire interest that was transferred to Nagshi and his brothers. Something was reserved, the right to collect an irregular tax in kind. It is questionable whether this was a free tenure created subject to service and whether it could be resumed when the tenure holder became incapable of rendering service, and there remained none to render the service.

[2] Instead of the three brothers building on the land and residing there, it happened that only Nagshi resided there. His brother Korshi was residing in Bombay. He did not build separately on this land and he died after some years. His another brother Mona died soon after the acquisition. Both brothers died without descendants and Nagshi was their sole heir. In that condition Nagshi mortgaged in usufruct this property to one Vershi Tokarshi by a written document of 1975 V. S. for 23 years. He did not, however, deliver possession. Instead he gave what is called an agreement to pay rent to the mortgagee and continued to reside on the property. This rent was not made directly recoverable by suit for its recovery. It was to be added to the mortgage debt and recovered with that in a suit for recovery of the mortgage debt. The mortgagee could not be evicted therefrom either. This was an unusual transaction under which the mortgagee could not recover possession from the mortgagor and could not sue for recovery of rent. He could only sue for recovery of the mortgage debt plus the rent by sale of the property by a suit for foreclosure.

[3] Vershi died in 1977 or thereabout. His brother Pashvir purported to sell Vershi's and his right in the property to his son-in-law Khimji Velji the plaintiff in V. S. 1996. In the meantime Nagshi died in 1986. After his death the defendants, the grantors of the land, took possession of the property either by way of escheat or in exercise of their permanent title as landlords. As Pashvir was unable to fight a litigation with the defendants he sold his right to Khimji who then brought this suit, suing the defendants as trespassers.

[4] The matter is very complicated. The defendants took various objections and made various claims. They said that the property came to them as escheat on Nagshi's death, because he had no son and his daughters abandoned the property; in the alternative they said that they resumed the grant on Nagshi's death

as no one was left there to pay the taxes. Then they said that Nagshi had only 1/3rd of this property and not the whole and so his mortgage of the remaining two-thirds created no interest in favour of the mortgagee Vershi and so this suit must fail in respect of the two-thirds of the property.

[5] Then they said that the mortgagee was Vershi. His widow is alive. The plaintiff's vendor Pashvir did not have any right in the mortgage and by purchase from him the plaintiff got nothing in the suit property. The plaintiff's answers to this were various, which I shall discuss below.

[6] The suit was decreed. Hence this appeal by the defendants.

[7] In argument before me, the learned advocate for the appellants abandoned the claim of escheat. As regards their claim of resumption of the grant, I am told that Pashvir tried on death of Nagshi to recover the property from the defendants by notice. He has filed this notice and the registered postal envelop in which it was sent. The property could not, therefore, be treated as an abandoned grant; nor could it be argued that the mortgagee would not have paid the taxes. The grantee's right in the property was transferable, only the transferee was to pay the prevailing taxes. The defendants, therefore, cannot be considered to have resumed the grant legally, and a person claiming from Nagshi can enforce Nagshi's right in the property as against the grantor.

[8] I shall now deal with the defendants' argument that Nagshi owned only 1/3rd of the property and so the mortgagee could claim only that 1/3rd and not the entire. The grant was in favour of three brothers. Two of them died before the mortgage. It is in evidence that Nagshi was the sole heir then of his deceased brothers. He, therefore, owned at the time of the mortgage his brothers' shares as well. To controvert this the defendants put up a case that as the two other brothers did not turn up, the grant in favour of them was not given effect to and the defendants retained possession of 2/3rds of the property. That, however, is not the evidence. The evidence, even of the defendants' is that Nagshi took possession of the entire land and put up a wall round it, which he certainly could do on behalf of his brothers, that when Korshi happened to come there from Bombay he paid the customary presents to the defendants and that Nagshi continued to use the entire property. The grant was in favour of 3 persons. It was delivered to them and one of them continued in possession. Later he became the other two's heir on their decease.

That grantee certainly owned at that date the entire grant.

[9] Now I come to the most important of the contentions, viz., that the plaintiff has acquired no right in the property by purchase from Pashvir, as the mortgage was in favour of Pashvir's brother Vershi and not Pashvir's and as Vershi's widow is alive. It was the plaintiff respondent who had to meet this objection to his title. In argument before me, he seemed to think that it was the defendant who has to make out a consistent opposition and as his objection was not consistent, it should be rejected. This is a bad argument. The defendant can oppose the plaintiff's claim on all grounds. As the mortgage was not in plaintiff's vendor's favour, it was for the plaintiff to plead and to prove a consistent case as to how his vendor acquired the mortgage. He managed, however, to involve himself in a maze. His first and instinctive reaction was to say that his vendor Pashvir obtained his brother's interest from his widow in V. S. 1994 by a written deed of release called Farkati and in my opinion this was the correct reaction. The wrong, however, was with that Farkati, for it is said to have been lost and it was not registered. A Farkati is a document creating or extinguishing a right in property (immovable in this case). This Farkati was worth more than 500 Koris. Its registration was compulsory. As it was not registered it created no legally enforceable right and it could not be used in evidence. This is apart from the fact that its execution was not proved as required by law; and it being lost, its secondary evidence, viz., testimony of the widow as to its contents, was not given either. The widow was indeed summoned as a witness, but that was to produce a corresponding document given by Pashvir to the widow, which she sent through a messenger.

[10] The learned advocate for the respondent argued that the Farkati could be used as evidence under proviso to S. 49, Registration Act. The only two relevant parts of that proviso are that such unregistered document could be used as proof of another collateral transaction and also for the purpose of making out a case under S. 53 (53A?), T. P. Act. Now in this case this Farkati was not required for proving a collateral transaction; it was required to prove the main thing in the suit, viz., title created by itself. If it did not create title this suit will not lie, at least in so far as the plaintiff's suit depended upon that transaction. Secondly this is not a case of use of an unregistered document under S. 53 (53A?), T. P. Act. Under that section a document not legally completed could be used to protect possession created or explained by it as against a contractor. Here it is sought to be

used as a weapon of offence to recover possession. It cannot be used to recover possession even from the contractor, still less can it be used to recover possession from a person who does not claim from the contractor.

[11] The respondent-plaintiff then argued that this was not a Farkati, though it was called so and that it was a deed of partition which in Kutch did not require registration. This argument is untenable. The plaintiff called for his corresponding agreement in favour of the widow. He proved its execution by himself. That can be used against him as his admission. It says that even after partition in V. S. 1976 the widow's husband Vershi continues to have business in Bombay jointly with Pasvir, that the business had to be wound up under heavy loss and debt, that there was much movable property like shares which belonged to Vershi (the widow's husband) and which Pasvir had utilised to pay off the debts, that on account of such use of that movable property he in fact owed something to the widow, that the widow desired to be free of the Bombay liabilities, that as she was maintained by her brother, she did not want to bother herself about her husband's debts, that therefore she was relinquishing all her rights in her husband's property in Kutch which was already in Pasu's possession, to Pasvir, on condition that Pasvir paid off the Bombay debts and saved the widow being dragged to Court. This certainly was not a deed of partition. It was a deed of release of the widow's right for consideration. She was releasing her rights in her husband's property in Kutch. It required to be registered. I, therefore, decide that the plaintiff's vendor Pashvir did not acquire from Vershi's widow any right in the suit property enforceable against an outsider not claiming from the widow.

[12] The plaintiff now falls back upon another line of attack, which is not quite consistent with his agreement dated V. S. 1994. He says that when Vershi acquired this mortgage in 1975 he did so for the joint family consisting of Vershi and Pashvir and that as surviving coparcener of the joint family he was the sole owner of the mortgage. This claim is against the admission in his agreement dated 1994 V. S. which admitted the widow's right in her husband Vershi's property to which property he, Pashvir, would be an heir on the widow's death as expressly recited therein.

[13] Even so, let us consider the evidence of this coparcenary. Coparcenary always presumes a joint family and for the purpose of inheritance by survivorship it is coparcenership by birth which matters and not obstructed coparcenership, as in this case, where property was self-acquired of a member's. As this mortgage was in favour

of Vershi alone it was for the plaintiff to prove that at the time of the mortgage Vershi and Pasvir were members of an undivided joint Hindu family. The best evidence he produced to prove this was the fact of partition between the brothers in 1976. This evidence was not enough. For a partition in 1976 does not mean that till that date the family was joint. The family might have separated with decision (without division?) of joint property. The plaintiff gave other oral evidence to prove joint familyship in 1975. This evidence does not prove joint familyship in 1975. On the contrary it disproves that. The witnesses said that the two brothers lived separate.

[14] Now supposing that in 1975 joint family and coparcenary existed, it ceased to be in 1976 when the partition was done. By that partition all ancestral property was at least divided between the brothers. Now the fact that some property was still kept joint, notably the business in Bombay, did not continue coparcenary or joint familyship in that property. Joint property is not the same thing as joint family property of coparceners. In fact the brothers had separated. That is the evidence. Neither the business in Bombay nor this mortgage was unobstructed coparceners' property at any time. Their remaining as joint property after separation and partition did not keep alive even obstructed coparcenership. That being so, Pasvir was not surviving member of a joint family of coparceners, when Vershi died in 1977 or thereabout. Therefore Vershi's widow became her husband's heir and Pasvir in his agreement dated 1994 admitted this right. All his argument now against that admission is opposed to evidence and must be rejected. If it, therefore, be presumed that in 1975 this mortgage was acquired for the joint family, it having not since been partitioned, the plaintiff has at least half share in the suit property along with another half of the widow's. The widow is not a party to this suit and the plaintiff cannot, therefore, alone claim to recover possession.

[15] It is argued that a suit ought not to be allowed to fail like this for defect of party and that the plaintiff may be allowed at least half of the property. Now I come to the question whether Pasvir at all had a share in this mortgage in 1975 when it was taken by Vershi. The fact is that in 1975, Vershi and Pashvir were living separate; it was, therefore, possible for Vershi to earn and keep his earnings separate for himself even while joint family property remained undivided. The above fact appears from depositions of the plaintiff's own witnesses. Then in 1976 there was the partition. The recital in that partition was that it was a partition of all (joint) ancestral and self earned property. That partition did not in-

clude this mortgage, although a sum of Koris 2000 was lent on it only the year before. About this partition, there is plaintiff's oral evidence that all Kutch property was divided and only the Bombay property remained joint. That Bombay property was a joint business. It was perfectly natural that it continued joint. Finally even in 1994 there was no occasion for a further partition. What was done then was to acquire Vershi's property in Kutch by a deed of release from the widow. Two inferences are possible from these facts. One is that this mortgage was kept out of the partition, because it was Vershi's personal property and not joint family property and was treated as Vershi's separate property at the partition. The second is that the mortgage deed was not acted upon. In either case, Pasvir had no interest in the property. The defendants-appellants have argued before me that the mortgage was not acted upon. But in view of the collateral rent note and in absence of any other evidence it cannot be concluded that the mortgage was not acted upon. I find it was acted upon.

[16] The result of my findings above is that the plaintiff's vendor Pasvir had no title to this property and acquired no enforceable title from Vershi's widow. The plaintiff has, therefore, no title in the suit property. I allow this appeal with costs and order that the suit be dismissed with costs.

D.H.

Appeal allowed.

A. I. R. (36) 1949 Kutch 16 [C. N. 13]

TRIVEDI J. C.

Meghji Vira-Kukma—Plaintiff — Appellant v. Khoja Karamali Gulam Hussein-Lakhod—Defendant—Respondent.

Civil Misc. Appeal No. 16 of St. 2004, Decided on 6th January 1949, against order of Dist. Judge, D/- 23rd August 1948.

Civil P. C. (1908), O. 1, Rr. 3, 10 (2) and O. 2, R. 3—Suit for declaration of title and recovery of possession on cause of action that defendant being lessee or licensee of plaintiff refused to pay rent and restore possession of land—Defendant denying plaintiff's title and possession at any time and that he ever took suit property on rent—Plaintiff examining his vendor to prove title deed—Vendor deposing that sale was without consideration and not acted upon and that land was in possession of his lessees—Leave to amend plaint and addition of vendor and his lessees as parties—Held amendment did not change character of suit—Causes of action against parties sought to be added were different from that against existing defendant—Prayer held could not be granted under O. 2, R. 3 but should be granted under O. 1, R. 10 (2) read with O. 1 R. 3 as question of title was common against all intended defendants and it also rested on same evidence. [Paras 2 and 3]

Annotation: ('44-Com.) Civil P. C., O. 1 R. 3 N. 3; O. 1 R. 10 N. 20; O. 2 R. 3 N. 8.

*Premji B. Thakkar—for Appellant.
N. V. Bhatt—for Respondent.*

Order.—This application is against an order refusing to allow the petitioner plaintiff to amend his plaint and to add other defendants to the suit. The appellate Court confirmed an order of refusal. The plaintiff petitioner's case is that he purchased two plots of land from Barot Prabhudash Ishwardas in 1991 (samvat year) and then leased them out on rent to the present defendant. Later he sued the defendant for rent. That suit was dismissed on the ground *inter alia* that the lease was not registered. After that the plaintiff brought this suit to have his title to the lands declared and to recover possession of the same from the defendant. The defendant denied the plaintiff's title and possession at any time and said that the land was not in his possession and he never took it on rent or otherwise from the plaintiff. During trial the plaintiff examined his vendor Prabhudas Ishwardas to prove his title deed. That witness turned against the plaintiff and said that though he had executed that deed, it was without consideration and not acted upon and that the land was now in possession of his lessees who are different persons. It was in consequence of this deposition that the plaintiff wished to amend his plaint, to add another cause of action and to sue additional defendants. That prayer was rejected [on the grounds that it would be a misjoinder of causes of action and parties and it would change the very character of the suit.

[2] I do not agree that the amendment would change the character of the suit. It is suit for declaration of title and for recovery of possession, and it will remain so after the amendment. The first ground seems reasonable, for the primary rule is that the same cause or causes of action should be against all defendants. That is not the case here. The cause of action against the present defendant is that he being a lessee or licensee of the plaintiff's refused to pay rent and to restore possession of the land. Declaration of title against him became necessary as he denied the plaintiff's title to the land. It arose at a late date. Against the plaintiff's vendor and other persons, who, said to be in possession as the vendor's lessees, the cause of action would be denial of the plaintiff's title deed as one without consideration and not acted upon and trespass upon the plaintiff's land by those other persons. Thus the causes of actions against the parties sought to be added are different from that pleaded against the present defendant. Rule 3 of O. 2 indicates against the plaintiff's prayer in this case.

[3] There are, however, other provisions in the Code under which the plaintiff's prayer should be granted. Rule 10 (2) of O. 1 says that the Court

may grant at any stage addition of any person as defendant whose presence would be necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in a suit. In this suit the question to be decided is of plaintiff's title to the suit land and the prayer to be granted is of delivery of possession. In absence of the other parties, the decision on the question of title will be incomplete and the prayer of delivery of possession cannot effectually be granted. As far as possible finality of a Court's decision should be ensured. That would fail in this case if the other persons were not sued. Rule 3 of O. 1 says that when if separate suits were brought against several persons a common question of law or fact would arise, all of them may be joined as defendants in one suit. In this case the question of title is common against all intended defendants and it also rests on same evidence. If there were actually separate suits against them, it would be advisable to try them jointly.

[4] Lastly no harm will be done to the present defendant by adding other defendants at this stage if future costs are saved to him. I, therefore, allow this application, set aside orders of the original Court and of the appellate Court and direct amendment of the plaint and addition of other defendants as desired by the plaintiff. The present defendant shall not be liable for future costs of the suit in the original Court. He, will, however, pay the petitioner. Costs of this application, for which the hearing fee is assessed at Rs. 15.

V.B.B.

*Application allowed.***A. I. R. (36) 1949 Kutch 17 [C. N. 14.]**

TRIVEDI J. C.

Khoja Ladha Danani and others—Defendants — Appellants v. Khoja Hasam Ismail and others—Plaintiffs—Respondents.

Appeal No. 3 of St. 1975, Decided on 31st January 1949, from order of Acting President of Jadeja Court, D/- 3rd Jeth Sud, Tuesday of 1974.

(a) Muhammadan law — Khojas — Community property — Members can claim interest in property for mundane purposes.

H. H. the Aga Khan was and is the religious or spiritual head of the Khojas. The Khojas may believe that all their communal wealth ultimately belonged to their spiritual guide and head, but that does not detract from their own right and interest in the property for mundane purposes. [Para 5]

(b) Muhammadan law — Wakf — Community property — Dispute as to possession — Property consisting of secular and religious parts belonging to Khoja community of Kera (Kutch) — Dispute between Imami Ismaili sect and Asna Asharis sect, both belonging to Khoja community — Held property no longer belonged to members of Asna Asharis sect and they had no right to enter or re-

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main thereon, although their ancestors had contributed to its cost.

Certain Imami Ismaili Aga Khani Khojas, as members of the orthodox Khoja community of Kera (Kutch), sued for recovery of possession of property belonging to the Khoja community from the custody of defendants who, though also members of the Khoja community belonged to the Asna Asharis sect. Part of the property consisted of the place of religious worship, meant for the Khojas' peculiar prayer recitations. The rest was secular. The defendants did not say their prayers in the place of worship in question at the date of the suit:

Held that the Khoja community is a religious community. They became Khojas by conversion to a particular religion. Their recognised and admitted place of worship was for use of such persons amongst them as subscribed to the practice of religious worship in that place. Others amongst them who did not subscribe to that custom had no right to enter it or to remain thereon, although their ancestors, or even they themselves before they dissented, contributed to its cost. In other words, the prayer hall belonged only to such persons as would say their prayers there. As the defendants would not do this, the prayer hall did not belong to them and they must be prevented from entering it if the persons following the old practice wished to do so. [Para 8]

Held further that so far as the secular property was concerned it would be improper to bar certain persons from use of community place merely because they have adopted some change in their religious practices and outlook; but if the variation adopted is repugnant to or incompatible with the old practices the non-conformists can be debarred from use of places of the orthodox community. [Para 10]

From the differences which existed between the religious beliefs and practices of the plaintiffs and the defendants, the defendants could not be said any longer to belong to the same community as the plaintiffs though they were born in the same. They, therefore, could not be allowed to enter any part of the property belonging to the community. [Para 19]

Held also that it was the plaintiffs' sect which was the prior one amongst the Khojas and therefore they were entitled to the Khoja community's property. [Para 29]

Gopalji U. Bhansali—for Appellants.

K. K. Chhaya (for Nos. 1, 2 and 3) and *U. K. Gor* (for No. 4)—for Respondents.

Judgment. — The plaintiffs-respondents are members of the Khoja community in Kera. They sued for recovery of possession of their place called "Khana" or 'Jammat Khana' and certain movables in it from the custody of the defendants-appellants and for permanently restraining the defendants from entering "Khana" and disturbing the plaintiffs' possession of the same. The defendants also are members of the Khoja community. The plaintiffs' case was that they were the orthodox original Imami Ismaili Agakhani Khojas, or followers of their true ancestors faith to which their ancestors were at first connected; that about the year 1962-63 V. S. the defendants dissented from the old faith, adopted a new faith repugnant to the orthodox Khojas, and opened a mosque as their place of prayer. Not satisfied with that the defendants by sheer force of numbers took pos-

session of the "Jumat Khana" and its property excluded the plaintiffs therefrom and prevented the use of the "Khana" by the plaintiffs for their orthodox worship. The plaintiffs sued in representative capacity as leading members of the orthodox Khoja community of Kera.

[2] The defendants contested the suit on various grounds, the Chief being that it was their faith which was the original pure faith of the Khoja community and that they were the plaintiffs who were following a novel and corrupt form of faith. Another main argument before me was that the Jamat Khana was a secular or a partly secular place of the Khoja community and that therefore they could not be deprived of its use by another section of the same community.

[3] The suit was instituted in 1971 v. S. It was decreed by the Jadeja Court in 1975 v. S. This appeal by the defendants is pending since that date. At the present day the number of the Imami Ismaili Khojas is very small. The defendants' sect claims allegiance of the rest. I am, however, not concerned with the present position. I have only to determine whether the learned Jadeja Court's decision of 1975 v. S. is correct.

[4] The appellants' first contention is that the plaintiffs are not competent to prosecute this suit. It is said that according to the plaintiffs' witnesses the Jamat Khana and its property belonged to the Agakhan. The plaintiffs not being the Agakhana's agents and representatives, it is argued, they cannot prosecute the suit. Now some witnesses might have said that. They spoke according to their understanding. But it is not correct to say that the Jamat Khana belongs to the Agakhan. It belonged to the old Khoja community of Kera. The property was acquired with the Khoja Jumat's money in the name of Jumat and in documents it still stands in its name. It was for the use of the Jumat. The members of the community made various contributions to the Jumat Khana. These were spent first for the running expenses of the Jumat Khana. Only the annual balance was remitted to the Agakhan, as the Jumat's offering or tribute to him. The use and management of the Jumat Khana vested in the local community's office bearers. These were for the benefit of the local community and not for the Agakhan's benefit.

[5] H. H. the Agakhan was and is the religious or spiritual head of the Khojas. The Khojas may believe that all their communal wealth ultimately belonged to their spiritual guide and head, but that does not detract from their own right and interest in the property for mundane purposes. I decide that the Jumat

Khana and its contents belonged to the old Khoja community as it was before a dispute arose between the parties and that, therefore, the plaintiffs are the proper persons as representatives of that community to bring this suit, intended to wrest the property from the defendants.

[6] The second point for decision on this appeal is whether the Jumat Khana was a secular place of the Khojas or their religious place (place of religious worship) or partly so. After some discussion the learned advocate, Mr. Bhansali, for the appellants admitted that at least in part the Khana was the place of religious worship of the Khojas of old. Indeed, formally, it was the only place of such worship. On the premises there is one big hall meant for the Khojas' peculiar prayer recitations and obeisance to their God. At one end of the hall there is a throne, on which the Agakhan may sit if he ever visits that place. That throne is a sacred object to the plaintiffs. It is in front of that holy seat that blessings of God are invoked and other worshipful chantings and recitations are done. These things were done there and nowhere else. It might be that in that same hall guests might be allowed to rest at night. But that fact does not detract from the essentially religious and sacred character of that hall.

[7] Besides the prayer hall there are other parts of the premises. For instance, the community's cooking utensils are kept in a room. Community dinners are held there. Marriages and similar functions are held there. It must be granted that this part of the Khana was purely temporal and that people who continued to belong to the Khoja community could not be deprived of its use. It is argued for the appellants that they may at least be allowed to use and remain in the temporal party — which would be an excellent opportunity to make the use of the khana by the plaintiff's section extremely hazardous.

[8] Now as regards the prayer hall, it is admitted that before the defendants made their mosque about 1962-63 v. S. all khojas including themselves, were saying their prayers in the khana hall and that that was their only place of saying prayers. Mr. Bhansali for the appellant further admitted that the defendants would no longer say their prayers in the khana hall. They would use it only for secular purposes. On this ground above the defendants must be prevented from entering the khana prayer hall and obstructing the plaintiff's use of it. The Khoja community is a religious community. They became Khojas by conversion to a particular religion. Their recognised and admitted place of worship was for use of such persons amongst

them as subscribed to the practice of religious worship in that place. Others amongst them who did not subscribe to that custom had no right to enter it or to remain thereon, although their ancestors, or even they themselves before they dissented, contributed to its cost. In other words, the prayer hall, in the khana belonged only to such persons as would say their prayers there. As the defendants would not do this, the prayer hall did not belong to them and they must be prevented from entering it if the persons following the old practice wished to do so.

[9] As regards the secular part of the Jamat-khana the position is not so simple. For analogy I refer to the dining and resting places of Hindu castes, called "Wadis" or "Dharamshala" or in Kutch "Brahmapuris of the Brahmans." These places are for secular purposes, unless there is a temple in one. All members of a caste have a right to use such a place for the purpose for which it is meant. Indeed, they could even lend its use to another caste for that purpose provided they can inter-dine, with that caste. But even as regards such a place, a man though born in a caste would have no right if he ceased to be a Hindu or ceased to be a member of that caste. On the other hand, if a man born in such a caste, merely changed his religious sect, say from Shaivism to Vaishnavism or to the Swaminarayan sect within the Hindu fold, he would not on that account cease to have rights in his caste's "wadi." Amongst Hindus as long as a man professes to belong to a particular caste and does nothing repugnant to the religion of that caste, he would remain a full-fledged member of it. The Khojas being a religious community similar reasoning would apply to the use of their community places. If a Khoja became a Hindu or a Christian, he could certainly not any longer have the right to enter or use a Jamat khana. It will thus be seen that the determination of this question depends upon the nature of change that has taken place in a section of the community.

[10] I for one would recognise that change and variation are bound to come about a community in course of time and it would be improper to bar certain persons from use of community place merely because they have adopted some change in their religious practices and outlook. But if the variation adopted is repugnant to or incompatible with the old practices the non-conformists can be debarred from use of places of the orthodox community. This test should be applied to the present case.

[11] What are the differences between the religious beliefs and practices of the plaintiffs and the defendants? The plaintiffs are called "Ismanee," "Ismaili Agakhan Khojas." The

defendants call themselves, "Asna Asaris." In this case the parties agreed to the points of difference between them. These were recorded. The defendants' pleader also gave a series of answers to examination by the Court before issues were framed. I find that funeral rites are remarkably similar in both. Marriage rites do not matter. For the rest some back ground may be recited here. Nominally the Prophet of Amalia was the source of their religion. The prophet according to himself was only a man chosen by God as medium through whom His will was revealed. According to orthodox Sunni Muhammadans the prophet was the last prophet and his word was final.

[12] The holy prophet left no son. He left a daughter named Fatima. She was married to Aly. Aly was the prophet's favourite and according to Shias his spiritual heir. Fatima and Aly had two sons Hassan and Hussein. The latter was killed at the reputed battle of Karbala. He left a son. The holy prophet himself, his daughter Fatima, his son-in-law Aly and Fatima Aly's two sons, Hassan, Hussein form a pantad 'Panchatan' in whom the Shia's believe. They believe that Aly was like the prophet and messenger of God, and that on dooms day the "Panchtan" would plead for their faithful followers before God who would then sit in judgment on all men. The Sunnis do not believe in revealed character of any one after the holy prophet. I mention this because of the character of difference between the beliefs of the Shias and Sunnis. Although, the prophet is common to both sects, the above difference is considered so fundamental that it has led to as much bloodshed and enmity between them as between any two religious sects in the world. Shias and Sunnis are two separate communities and it is well-established law that if a Shia born Muhammadan became a Sunni he would not be entitled to any interest in his birth community's communal property. This is an important thing to remember. Shias and Sunnis are both Muhammadans and owe allegiance to the prophet and yet because of the one difference that the Shias believe in revealed character of certain persons after the prophet and to the Sunnis there is no prophet after the holy prophet, the two sections became so exclusively separate different communities. We shall see that the differences between the Ashna Ashris and the Ismailis are of a more fundamental character and varied nature.

[13] Ashna Asharis believe in further revealed personages and their succession. Ali was the first Imam and beginning with him the Ashna Asharis believe in a succession of 12 Imams. The 12th Imam disappeared and so the revealed Imamate stopped, though ordinary Imamate

continued. According to them the 7th Imam was Kasam Musa. They do not believe in the present Imamate of H. H. the Agakhan. They do not render homage to him. They would not allow any of their funds to be diverted to the Agakhan. They do not say their prayers in a Khana. They say Namaz in a Mosque invoking the Panchtan only. They believe in but one day of judgment, the dooms day when the Panchtan, and other Imams including the 12th, disappeared one, will testify to their faith and admit them to paradise everlasting.

[14] The Asna Asaris observe the Ramjan fast.

[15] The beliefs and tenets of the Ismailis are widely different from this. They are called Ismaili's because their 7th Imam was Ismail, against the Asna Asari's Musa Kasam. They start by believing Ali, their first Imam, to be an incarnation of God. Thus they place Ali above the prophet himself. Not only that to a Muhammadan Shia or Shunni it is heresy to say that God takes incarnation in the form of man. That amounts to blasphemy. This is fundamentally different from the teachings of the holy prophet. Then the Ismailis believe in the revealed character of all Imams to the present day. His Highness the present Agakhan is their 48th Imam in Ali's and Ismailis line. This makes as much difference between Ismailis and Asna Asaris as that between the Shias and Sunnis. To the Ashna Ashrais His Highness the present Agakhan is only a Pir, i. e., a holy man and nothing more.

[16] The Ismailis do not have to wait till the dooms day for entering paradise. According to them, the present Imam decides whether a particular Khoja will enter paradise on death or will have to be born again. This rebirth is pure paganism to the Ashna Asharis.

[17] The Ismailis do not say Namaz and do not believe in mosques. They invoke the blessings of all Imams upto the present Imam, as well as of the Prophet; but they invoke Ali as true God himself. After this invocation they recite what are called "Juanas" or precepts of their converter Pir Sadruddin. An Ashna Asaria will not recite these precepts which according to him would be pagan ritual.

[18] The Ismailis do not observe the fast of Ramjan.

[19] The above differences are nothing compared with the topping difference which I shall now mention. The Imami, Ismaili Agakhani Khojas which the plaintiffs are, believe in nine Hindu Incarnations of the God, the tenth being their Ali Imam. This tenet completely severs the one sect from the other. The Asna Asaris are in short followers of a sect of Muham-

madanism. The Ismailis are not. With these differences, the defendants cannot be said any longer to belong to the same community as the plaintiffs, though they were born in the same. They, therefore, cannot be allowed to enter any part of the plaintiffs' Jumat Khana, not even the part outside the prayer Hall. Nor can they be allowed any share in that Jumat Khana's movable property like cooking utensils. Dissenters have to get out with their skins only. They cannot get the church, neither the vicarage, nor the Parish. The above differences are admitted. I shall not mention minor things like recital or non-recital of Kalama at the time of circumcision.

[20] The defendants, however, say that it is their sect which was the prior one amongst the Khojas and they are the plaintiffs who have changed and been corrupted by the Agakhan. And, therefore, they should get the khoja community's property. This is then the last and most important question to be decided whose was the prior belief or what belief was prevailing amongst the khojas at Kera when the suit property was acquired? Fortunately for me this very question has been decided before this suit was instituted in Kathiawar and in Bombay. The Kathiawar Judge followed the judgment of the Bombay High Court of 1866 A. D. I shall adopt the reasoning of that judgment and rely upon the fact that exactly the same differences then existed in Bombay amongst the Khojas there, so that the supposed background of the dispute at Kera sought to be built up by the defendants drops out.

[21] It is admitted that the Khojas of Kera were in their unregenerate days Hindu Luvanas about 5 centuries ago. There came a Pir Gulam Sud-ud-din to convert them and they were converted and were called Khojas. To that community belong the plaintiffs and the defendants. The dispute in Kera arose in 1962 V. S., say 1906 A. D. It was then that the defendants first made their mosque in Kera and stopped using the Khana as their prayer house. The property in suit was completed 15 years before that. In 1950 V. S. 1894 A. D. His Highness the present Agakhan returned to India from a European tour. As a young man fully influenced by European liberalism he thought it necessary, so it is said, to issue instructions in a booklet to his followers in faith on religious matters. This booklet is exhibited. It is said to have been published in 1894 A. D. In 1895 A. D. the Khojas of Kutch including the Khojas of Kera presented a valedictory address to His Highness the Agakhan, a printed copy of which has been exhibited. It is said in that address that the faithful followers were much obliged to His Highness for the

above booklet. I shall take that booklet to have been published by His Highness the Agakhan in 1894 A. D. That booklet contains injunctions about Namaj and Roja (fast of Ramjan) in accordance with the defendants' faith; though it also contains an exhortation to recite "Duwa" as well as Namaz, a claim that His Highness the Agakhan is a descendant of Ali and as such the present Imam, and an exhortation to pay "Zakat" to him, which things the defendants do not believe or observe. Then, so it is argued His Highness realised that he had committed blunder in so enlightening his followers as it affected his sacred position and purse; and a few years later he began secretly undoing the mischief done to himself by that booklet. The result was a new sect of Imami, Ismaili Agakhani Khojas, whom the defendants were obliged to turn out of the Jamat Khan. I think that from these facts one can equally well argue that His Highness having returned, apart from European influence doubted his revealed character and so issued a booklet containing tenets of Shia religion with a view that his followers might be called Muhammadan when a few years of a life of revealed character wore out puritanism from him, he desired his subjects to revert to the beliefs studiously propagated by his ancestors. The defendants would have me believe that especially the Godhood of Ali and the ten incarnations of God, including adoption of the Hindu incarnations, were innovations made after 1895 A. D. That is clearly not a fact. For, the judgment of the Bombay High Court of 1866 A. D., exhibited in this case, mentions exactly the same beliefs and practices of the Ismaili Khojas then prevailing, amongst the Khojas. These were then old beliefs and practices and not innovations after 1895 A. D.

[22] On the other hand, it is admitted that saying Namaz in mosques, building mosques for that purpose, not saying prayers in Jamat Khans, stopping payments of Zakat to His Highness the Agakhan and not saying "Duwa" were innovations introduced by the defendants after 1950 V. S., in the neighbourhood of 1962 V. S. Even the booklet relied on by the defendants eschews Asna Asarism, i. e., stopping at the 12th Imam and ignoring Ismail as the 7th Imam whose descendant His Highness the Agakhan is supposed to be.

[23] In the judgment of the Bombay High Court an incident of pilgrimage by a troupe of Khojas from India to the then Agakhan at Kerman in Persia is narrated. That shows that at that date, beginning of 19th century, Khoja considered the Agakhan to be so holy as worthy of a pilgrimage. It is the defendants who have dissented from that

[24] Looking to the history of spread and fanaticism of the faith of the desert, one cannot imagine a process of corruption of even Shia Muhammadanism by the Hindu Pantheon. Influence would be felt in the reverse direction. People half way to Islam would try to complete Islamism and not conversely. In fact that is what has happened to the defendants. They were not Muhammadans so far. Now they have become Muhammadans.

[25] Pir Sadraddin's alleged precepts (Juana's) which the plaintiffs recite as part of their prayers, are in old Sindhi, i. e., non-arabised Sindhi and are written in old Sindhi character akin to Devnagari, not in modern urdinised Sindhi characters. That respects the old age of these aphorisms; whether they were actually composed by Sadraddin or not, is a different and in my opinion unimportant matter.

[26] If Sadraddin was an Ashna Ashri, Khojas would be doing pilgrimage to his tomb in India and not to the living Agakhan at Kerman. The fact is, as stated in the Bombay High Court's judgment, that Khojas never thought of doing pilgrimage to Sadraddin's tomb and always to the Agakhan. In that judgment the method of spread of the Ismaili faith is narrated. Its agents began by pretending to believe the would-be convert's faith and tradition as true; then they introduced slight change of orientation in them and directed them towards Ali Imam and finally when the converts were securely won they were led to rely only on Ali Imam as the present incarnation of God. The reputed "Juana's" of Sadraddin's show just such process: adoption of the Hindu incarnation of God, use of Hindu language and nomenclature and then fixing Ali at the end of it all. Therefore, the present faith of the Ismailis Khojas is the more likely to have been handed down by Sadraddin to the converts in Sindh, Kutch, etc.

[27] The defendants' pleader on being examined by the trial Court admitted that the "Juana's" used to be recited in the Khana before they dissented and made a mosque.

[28] The present Agakhan's grandfather who was the first Agakhan to come to reside in India, published a pamphlet in 1861 calling his followers amongst Khojas to conform to the Imami Ismail's faith. This was done by the Khojas of Kutch. The defendants dissented some 45 years after that.

[29] I think that what is written above is quite sufficient to show that it was the Ismail's faith including the theory of ten incarnations and Godhood of Ali and the continuous Imamate descended from Ali to the present day, which was handed down by Pir Sadraddin, who

came to Julwa, as the then Imam's agent, and that the defendants' faith Asna Asarism was an innovation amongst the Khojas of Kera about the year 1962 V. S. or thereabout. I decide accordingly.

[30] The Khoja community's property in Kera the property in suit shall belong to and remain with the Imami,—Isamaili sect—The defendants must be permanently restrained from entering it and from disturbing the plaintiffs' enjoyment of the same. I confirm the lower Court's judgment and dismiss this appeal with costs.

V.B.B.

*Appeal dismissed.***A. I. R. (36) 1949 Kutch 22 [C. N. 15.]**

TRIVEDI J. C.

The Kutch Government—Appellant v. Sevak Ishwarlal Thakoradas and others — Accused — Respondents.

Criminal Appeal No. 16 of 1949, Decided on 15th July 1949, against order of Addl. 1st Class Magistrate, Bhuj, D/- 25th April 1949.

Criminal P. C. (1898), S. 247 — Complaint by public servant — Complainant absent being transferred—Accused should not be acquitted but other witnesses should be examined.

When a complaint is filed by a public servant and on the day of hearing he is absent being transferred from the place, the complaint would be prosecuted by the police or the Public Prosecutor. The Magistrate, instead of acquitting the accused because of the absence of the complainant public servant, should examine the other prosecution witnesses summoned to appear on that date. Merely because one of the witnesses, viz., the public servant, is absent, the Magistrate cannot refuse to examine other witnesses. The case is different when the complaint is filed not by a public servant but by a private servant. [Para 6]

Annotation: ('46-Com.) Criminal P.C., S. 247, N. 9. Chandrashanker P. Pandya, Public Prosecutor

—for Kutch Govt.

Krishnalal P. Kotwal (for No. 2) Krishnalal N. Man-
kad (for No. 3) and Jamiatrai G. Vaidya (for No. 4)

— for Respondents.

Accused 1 & 5 present in person.

Judgment. — This is an appeal against an order of acquittal under S. 247, Criminal P. C., in a case of affray under S. 160, Penal Code against five persons, for absence of the public servant who made the complaint in the case. The five accused persons are present either by pleader or by themselves and I have heard their arguments.

[2] It appears that one of the accused persons gave information one night to the police that he was beaten by some others. The police inquired into that information and found that the parties had fought amongst themselves on a public street and had committed the offence of affray. So one of the police officers was chosen to make a complaint against the fighters to the Magistrate.

[3] Upon receipt of the complaint the Magistrate promptly examined the police officer on S. A., ignoring the provisions of S. 200, Criminal

P. C. It is not recognised by some Magistrates in this province yet that with the introduction of the Criminal Procedure Code into Kutch the procedure was well defined and was meant to be studied and followed. That was on 28th March 1949. I am told that 6th April 1949 was fixed for appearance of the accused persons. When they did appear and that 16th April 1949, was fixed as the first day of hearing. I am further told that on 16th April 1949 the complaining public servant did not appear and the hearing was adjourned to 26th April 1949 and subsequent dates. 26th April 1949 was fixed only for the examination of the complainant-public servant and other witnesses were to appear on subsequent days.

[4] In the meantime the police officer had gone away to Khavda on transfer. He sent a report therefrom that he was unable to attend Court on 26th April 1949 for reasons stated by him.

[5] The Magistrate, however, thought that the police officer was only trying to harass the accused persons and was pursuing dilatory tactics. He, therefore, acquitted the accused persons under S. 247, Criminal P. C., on the ground that the complainant of the case was absent.

[6] In doing so the learned Magistrate ignored the proviso to S. 247. There is a difference between a private complainant and a public servant complainant. A private complainant's presence may be required to conduct his case. But a public servant is not so required. His complaint would be prosecuted by the police or Public Prosecutor, as was being done in this case. What was required to be done in this case was to examine witnesses to prove the case. The public servant would be only one of the witnesses. There were other witnesses who were summoned to appear on succeeding days. Merely because one witness was absent the Magistrate would not terminate the case. He was bound to examine the other witnesses. The case was not such as could not go on in absence of the police officer. It was not such as could not proceed with evidence of witnesses to come. Under these circumstances it was unjust and unwarranted by law to terminate the case at once. The Magistrate's order is manifestly untenable.

[7] The accused persons tell me that the case is petty and should not be revived and that the Magistrate has acted wisely. How the Magistrate has acted I have shown above. As to pettiness of the case, I do not think that people who fight on a public street should escape prosecution. The case must proceed legally to its end.

[8] I advise the learned Magistrate to lay before him the Criminal Procedure Code while trying criminal cases and always to consult the

book before making use of its provisions. That would be good opportunity to learn the law and a sound way to avoid mistakes.

[9] I allow this appeal, set aside the order of acquittal and remand the case for retrial according to law.

R.G.D.

Appeal allowed.

A. I. R. (36) 1949 Kutch 23 [C. N. 16.]

TRIVEDI J. C.

Jamkubai — Defendant 1 — Appellant v. Premji Devshi and others — Plaintiffs — Respondents.

First Appeals Nos. 117 and 116 of St. 2005, Decided on 8th July 1949, against decree of Addl. Dist. Judge, D/- 18th January 1949.

(a) Evidence Act (1872), S. 101 — Mortgage — Redemption suit by purchaser of equity of redemption — Plaintiff must establish mortgage and mortgagor's title — Then burden shifts on defendant to establish his title.

In a mortgage redemption suit by the alleged purchaser of equity of redemption, when the mortgage is denied, the plaintiff has to prove that so and so mortgaged the suit property to so and so, that that mortgagor had mortgagable title in the property and that the plaintiff has obtained that title. Until that is proved there is no burden on the defendant, the alleged usufructuary mortgagee in possession, to prove his title and in absence of proof of his title it cannot be presumed that the alleged mortgage must be true. [Para 3]

Annotation: ('46-Man.) Evidence Act, Ss. 101, 103, N. 58.

(b) Evidence Act (1872), S. 91 — Mortgage — Proof — Question whether property A is mortgaged — Recital in sale deed of property B, in describing boundary of B, referred to property A as mortgaged property — Recital held not independent proof of mortgage of property A but at best corroborative piece of evidence — Evidence Act (1872), S. 157.

[Para 6]

Annotation: ('46-Man.) Evidence Act, S. 91, N. 6; S. 157, N. 8.

(c) Evidence Act (1872), S. 115 — Admission of party not leading opponent to act upon it — Admission does not operate as estoppel — Party making admission is not debarred from disproving it.

[Para 6]

Annotation: (46-Com.) Evidence Act, S. 115, N. 2 (b).

(d) Contract Act (1872), S. 11 — Contract by guardian on behalf of minor for benefit of minor — In Kutch, minor cannot avoid it when he attains majority.

[Para 10]

Annotation: ('46-Man.) Contract Act, S. 11, N. 4.

Krishnalal N. Mankad (for No. 1) and Surjit U. Bhansari (for No. 3) — for Appellants.

Mulshanker K. Gor (for No. 1) and Manharrai M. Mehta (for Nos. 1, 2 and 3) — for Respondents.

Judgment. — The plaintiffs-respondents sued for redemption of a usufructuary mortgage and for recovery of possession of the mortgaged property from the defendants 1-2. Their case is that in the year 2001, v. s. they purchased the equity of redemption from Bhara Mulji aged 49, Parmabai widow of Veja Palu aged 74 and Lakhaman Vachhia aged 20 by three separate documents

for consideration and that the ancestors of the plaintiffs' vendors had mortgaged this property in usufruct to an ancestor of defendant Jamkubai's husband at some indefinite age before s. y. 1925. The principal defendant Jamkubai denied existence of any mortgaged interest in the property denied the plaintiff's right and claimed that the property was outright hers. There was also a dispute about the amount of mortgage, the plaintiffs' being unable to say definitely the amount of the mortgage.

[2] The suit was decreed. The principal defendant Jamkubai has appealed by Appeal No. 117/5 of 2004/1949 v. s. Defendant 3 Khimji Liladhar, son-in-law of Jamkubai's has also appealed by Appeal No. 116/4 of 2005/1949 v. s. I shall take up Jamkubai's appeal first.

[3] In a mortgage redemption suit, the plaintiff has to prove that so and so mortgaged the suit property to so and so, that that mortgagor had mortgagable title in the property and that the plaintiff has obtained that title. Until that is proved, there is no burden on the defendant. He is not required to prove his title and in absence of proof his title it cannot be presumed that the alleged mortgage must be true. In this suit we are dealing with old ancestral property of the defendant's in their possession for an indefinitely long time. In fact no hint has been given as to when the alleged mortgagors were last in possession of the suit property. That has been left severely alone. There is little evidence to prove the mortgage directly, in fact none. It is sought to be inferred from certain recital and other facts.

[4] The three vendors of the plaintiffs were examined as witnesses and they deposed that the property was mortgaged by their ancestors Karami and Khangar to Hansraj husband of the defendant's, or so they heard from their ancestors. Now there is good evidence to show that they did not learn this fact from their ancestors. Before doing so I shall mention the vendors genealogy as given by them.

Common Ancestor.
(Name unknown.)



I shall take this genealogy for granted. (After considering the evidence the judgment continued).

[5] How then did the plaintiff propose to prove the mortgage? Three pieces of evidence were referred to.

[6] (i) Two documents, one of V. S. 1925 and another of V. S. 1955. By the former sons and grand-sons of Karamshi sold a part of field to the South of the suit property. In describing its Northern boundary the language used is susceptible of the meaning that one Ravji possessed it as a mortgagee. By the latter document Ramu s/o Khengar sold his part of the same field. In describing its Northern boundary, the present suit property was referred to as mortgaged to Mathradas by some Charans. Now if Ramu had a mortgagor's interest in it he would not refer to it as mortgaged by some Charans. In the earlier document the mortgagor is left to be guessed. Now such recitals are not independent proof of mortgage of the suit property. They at best are corroborative pieces of evidence. We have nothing original yet to be corroborated. These documents, the latter of which is not quite in conformity with the second piece of evidence presently following, do not prove the plaintiff's mortgage.

[7] (ii) In 1948 S. Y. Parmabai's husband's brother applied to the State Government that he would like to sell his Garas to the State. Upon this the State conducted some inquiry into that applicant's title. In course of that inquiry, defendant's husband Hansraj said that he did not then have his title deeds with him, that they were with his brother at Janjibar, Africa and that he did not know whether his title was of a mortgagee or of an outright owner. So old was the interest at that date already. I do not see how this application by Karamshi's descendant proves mortgage of the suit property. At best it was a speculative claim. It might be as a result of that inquiry that the State decided to purchase nothing from that descendant of Karamshi's. This fact reduces the evidenciary value of that incident of 1948 to practically nothing.

[8] (iii) In V. S. 1997 Lakhman Vachhia's mother transferred her interest in the suit property to one Kheta. On the strength of that transfer Kheta sued for the present defendant to redeem the property. That suit was withdrawn on the defendant's son-in-law Khimji Liladhar purchasing from Kheta whatever right he claimed in the property. This is supposed to estop the defendant from denying Lakhman's interest in the property. This estoppel applies only to Khimji Liladhar and he cannot deny Kheta's interest and Lakhman's right to redeem it. This estoppel does not apply to the defendant. Of course in a way the defendant, Jamkubai admitted that Kheta had a valuable interest. But as that admission did not induce the present plaintiff to do anything, it can be disproved by the defendant. She says that as she did not possess

any title deed she paid the price of saving harassment of litigation. This is enough to disprove the admission. The effect of the purchase by Khimji from Kheta has been misconstrued here. Its only effect would have been felt when Kheta's vendor sought, after 99 years, to recover it from Khimji Liladhar. This transaction of 1997 throws much light on the present plaintiff's transaction. In 1997 Kheta dipped his fingers into the pie and brought out Rs. 1500. No sooner had the defendant spent that sum to save her title than the plaintiff tried exactly the same thing. But this time his fingers will be burnt.

[9] I decide that the suit property was not mortgaged by the plaintiff's vendors' predecessors to the defendant. Jamkubai's husband's predecessor, that so far as the plaintiffs are concerned Jamkubai is outright owner of the property and that the plaintiffs' vendors having no interest in the property, the plaintiffs have acquired none. I allow this appeal with costs. I order that the suit be dismissed with costs. I find that the plaintiffs have speculated too much into litigation and hence thereby caused much harm to Jamkubai. I order that the plaintiffs shall pay Rs. 500 as special costs of the suit and the appeal together to the defendant Jamkubai. This total shall include other ordinary costs.

[10] Now I come to Khimji's appeal 4/1949. The forgoing decision renders further discussion unnecessary. But I wish to point out the plaintiffs' right vis a vis Khimji. The plaintiffs vendor's mother mortgaged the supposed equity of redemption to Kheta for 99 years. That was a sham transaction and an absolute shibboleth. But the form of the mortgage being usufructuary that mortgagor cannot recover possession from Khimji (Kheta's vendee) during the stipulated period. This transaction was entered by Lakhman's natural guardian during his minority. He has not avoided it after attaining majority. In this province he cannot do so if the transaction was for his good, which it purported to be, though only material not moral. Thus that transfer is binding on him. Thus the plaintiffs have obtained nothing against Khimji for 99 years. Their right to recover possession having been delivered to Khimji they cannot sue Khimji to recover possession during that period of 99 years. This was not a simple mortgage which could be allowed to stand by. The suit against Khimji must be dismissed. I allow this appeal with costs to Khimji and dismiss the suit against him with costs to him.

R.G.D.

Appeals allowed.

Advocate High Court

Janm...

Acc No

Date

END

S. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.